TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

No. 290

ERNEST A. WATSON AND M. GLADYS WATSON,
PETITIONERS,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 25, 1952
CERTIORARI GRANTED DECEMBER 8, 1952

No. 12982

United States
Court of Appeals
for the Ninth Circuit

ERNEST A. WATSON and M. GLADYS WATSON,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record

Petition to Review a Decision of The Tax Court of the United States

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES

For Petitioner:

A. CALDER MACKAY, Esq.
ARTHUR McGREGOR, Esq.
HOWARD W. REYNOLDS, Esq.
CHARLES J. HIGSON, Esq.

For Respondent:

A. J. HURLEY, Esq.

The Tax Court of the United States

Docket No. 18856

ERNEST A. WATSON and M. GLADYS WATSON,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1948

June 1—Petition received and filed. Taxpayer notified. Fee paid.

June 3—Copy of petition served on General Counsel.

July 21—Answer filed by General Counsel.

July 21—Request for hearing in San Francisco filed by General Counsel.

July 27—Notice issued placing proceeding on San Francisco calendar. Service of answer and request made.

Aug. 16—Motion to transfer place of hearing to Los Angeles, California, filed by taxpayer. 8/17/48 Granted.

1949

Sept. 27—Hearing set Dec. 5, 1949, Los Angeles.

1949

Dec. 6, 7, 8 and 9—Hearing had before Judge Turner on merits. Appearance of C. J. Higson filed. Amendment to petition filed. Answer to amendment filed. Stipulation of facts filed at hearing. Briefs due 4/17/50. Replies due 5/17/50.

Feb. 16—Transcript of hearing 12/6/49 filed.

Feb. 16—Transcript of hearing 12/7/49 filed.

Feb. 16—Transcript of hearing 12/8/49 filed.

Feb. 16—Transcript of hearing 12/9/49 filed.

1950

April 3—Motion for extension to May 17, 1950 to file briefs and to June 17, 1950 to file reply brief, filed by taxpayer. 4/5/50 Granted.

May 17—Brief filed by taxpayer. Copy served.

May 17—Brief filed by General Counsel.

June 19—Reply brief filed by taxpayer. Copy served.

June 19—Reply brief filed by General Counsel.

Dec. 7—Findings of fact and opinion rendered, Turner, J. Decision will be entered under rule 50. 12/8/50 Copy served.

1951

Jan. 23—Respondent's computation filed.

Feb. 6—Hearing set Feb. 14/51 or respondent's computation.

1951

Feb. 14—Hearing had before Judge Kern, on settlement. Referred to Judge Turner. (Uncontested.)

Feb. 15—Decision entered, Turner, J., Div. 8.

May 11—Petition for review by U. S. Court of Appeals, 9th Circuit, filed by taxpayer.

May 11—Proof of service filed.

May 28—Statement of points and designation of parts of record, with proof of service thereon, led by taxpayer.

May 28—Designation of contents of record with service acknowledged thereon filed by taxpayer.

June 5—Supplemental designation of record with service acknowledged thereon filed by General Counsel.

The Tax Court of the United States

Docket No. 18856

ERNEST A. WATSON and M. GLADYS WATSON,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency bearing symbols LA:IT:90D:LHP, dated March 8, 1948, and as a basis of their proceeding allege as follows:

I.

The petitioners are individuals, husband and wife, with residence at Santa Ana, California. A joint return for the period here involved was filed with the Collector of Internal Revenue for the Sixth District of California.

II.

The notice of deficiency, copy of which is attached and marked "Exhibit A", was mailed to the petitioners on March 8, 1948.

III.

The taxes in controversy are income taxes for the calendar year 1944, and are in the amount of $24,101.35.

IV.

The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(A) Respondent erred in adding to petitioners' income the sum of $40,833.33, alleged to represent ordinary income from the partnership operations of T. J. Dofflemyer & Sons.

(B) Respondent erred in failing to determine that the entire profit from the sale of petitioners' one-third interest owned by petitioner M. Gladys Watson in agricultural property located near Exeter, California, constituted proceeds from the sale of capital assets within the purview of Section 117 of the Internal Revenue Code.

(C) If the Court determines that a portion of the proceeds received from the sale of said agricultural property, as indicated above, constituted ordinary income and not capital gain, then the respondent erred in determining that the fair market value of the growing crop at the date of sale allocable to petitioner, M. Gladys Watson, exceeded the sum of $5,916.76.

V.

The facts upon which the petitioners rely as the basis of this proceeding are as follows:

(a) Petitioners are individuals residing at Santa Ana, California. During the entire calendar year 1944, petitioners were married and living together. Petitioners filed a joint income tax return, Treasury Form 1040, for the calendar year 1944, wherein was reported the entire income and deductions of both spouses.

(b) During the year here under review petitioner, M. Gladys Watson, owned as her separate property an undivided one-third interest in agricultural land, consisting of orange grove and peach orchard, located near Exeter, County of Tulare, State of California, together with improvements and equipment located thereon. Said property was acquired on or about January 1, 1942, and was sold to one J. W. C. Pogue through an escrow agreement with the Security Title Insurance and Guarantee Company of Visalia, California, on August 10, 1944. The cost or other basis to petitioner, M. Gladys Watson, of said undivided one-third interest at the effective date of sale was at least $14,320.34, and the net amount received by petitioner, M. Gladys Watson, after deducting selling expense, was $62,526.17, all of which was returned as income and tax paid thereon to the Collector of Internal Revenue for the Sixth District of California at Los Angeles, California.

(c) Said agricultural property consisted principally of an orange grove and a small peach orchard. The peach crop on said property was substantially matured at the date of sale and the proceeds therefrom, amounting to $1,729.74, were turned over to

the purchaser in accordance with the terms of the sale agreement. The expense of producing the peach crop was $3,107.04. The fruit upon said orange trees was set on or about July 1, 1944, and at the date of the contract of sale (August 10, 1944) was undeveloped and unmatured. Said fruit was not completely grown or matured until on or about December 15, 1944.

(d) Upon information and belief petitioners allege that because of the hazards incident to growing orange crops, the fruit on the trees at the date of the sale had no fair value or readily realizable market value separate and apart from the land itself. Petitioner M. Gladys Watson's share of the expense of producing the orange crop to the date of sale was $5,340.18. If the Court finds that such growing crop of fruit was stock in trade or other property, the income from which is subject to tax as ordinary income, and not real property, the income from the disposition of which is subject to capital gains tax, then the petitioners allege that the fair market value of the growing crop did not exceed the expenses of producing same to the date of sale, or $5,340.18.

(e) The property was sold as real property without any agreement of the seller or the buyer as to allocation between the growing crop as distinguished from the land. All of said property covered by said sale was property used in petitioner's trade or business of a character which is subject to an allowance for depreciation, as provided in section 23 (l) of the Internal Revenue Code, held for more than six

months, and real property used in the trade or business held by petitioner for more than six months and was not property of a kind which would properly be includible in the inventory of petitioner, nor was it property held by petitioner primarily for sale to customers in the ordinary course of trade or business.

Notwithstanding these facts, the respondent has erroneously determined that $40,833.33 of the selling price of $62,526.17 (petitioner M. Gladys Watson's one-third interest therein) was for the sale of fruit growing on the trees subject to tax as ordinary income, and that the provisions of section 117 (j) of the Internal Revenue Code were not applicable to such portion of the sales price.

Wherefore, the petitioners pray that The Tax Court of the United States hear and determine this appeal and render judgment in accordance with the foregoing.

Respectfully submitted,

/s/ A. CALDER MACKAY
/s/ ARTHUR McGREGOR
/s/ HOWARD W. REYNOLDS
/s/ CHARLES J. HIGSON

State of California,
County of Los Angeles—ss.

Ernest A. Watson and M. Gladys Watson, being duly sworn, say: That they are the petitioners named in the foregoing petition; that they have read the said petition and know the contents thereof; that the

same is true of their own knowledge, except as to those matters which are stated therein on information or belief, and as to those matters they believe them to be true.

/s/ ERNEST A. WATSON
/s/ M. GLADYS WATSON

Subscribed and sworn to before me this 27th day of May, 1948.

[Seal] /s/ DOROTHY ERBEN,
Notary Public, County of Los Angeles, State of California.
My Commission expires Sept. 28, 1951.

EXHIBIT A

Treasury Department, Internal Revenue Service
417 South Hill Street, Los Angeles 13, California

Office of Internal Revenue Agent in Charge,
Los Angeles Division
LA:IT:90D,LHP March 8, 1948

Mr. Ernest A. Watson and Mrs. M. Gladys Watson, Husband and Wife,
Route No. 1, Box 170, Santa Ana, California.

Dear Mr. and Mrs. Watson:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1944 discloses a deficiency of $24,101.35, as shown in the statement attached.

Exhibit A—(Continued)

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington 25, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your return by permitting an nearly assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

GEO. J. SCHOENEMAN,
Commissioner,

By GEORGE D. MARTIN,
Internal Revenue Agent in
Charge.

Enclosures: Statement—Form of waiver

Exhibit A—(Continued)

Statement

LA:IT:90D:LHP

Mr. Ernest A. Watson, and Mrs. M. Gladys Watson, Husband and Wife, Route No. 1, Box 170, Santa Ana, California.

Tax Liability for the Taxable Year Ended December 31, 1944

	Deficiency
Income tax	$24,101.35

This determination of your income tax liability has been made upon the basis of information on file in this office.

Adjustments to Net Income

Net income as disclosed by return	$ 80,573.86
Additional income:	
(a) Income from partnership increased	40,833.33
Total	$121,407.19
Reduction of income:	
(b) Net gain from sale or exchange of capital assets decreased	20,416.66
Net income adjusted	$100,990.53

Explanation of Adjustments

(a) and (b) In your return you report a net gain of $48,819.82 from the sale of your one-third interest in an orange grove, 50% of which, or $24,409.91, you took into account under the provisions of section 117(j) of the Internal Revenue Code. It has been

Exhibit A—(Continued)

determined that your one-third share of the fair market value of the crop of fruit growing thereon was the amount of $40,833.33, and that the provisions of section 117(j) of the Internal Revenue Code are not applicable to such portion of the sale price. The amount of $40,833.33 is therefore added to ordinary income in adjustment (a) and, in adjustment (b), the amount of $20,416.66 (50% of $40,833.33) is eliminated from the long-term capital gain of $24,409.91 reported from such sale.

Computation of Alternative Tax

Net income adjusted		$100,990.53
Less: Excess of net long-term capital gain over net short-term capital loss		3,993.25
Ordinary net income		$ 96,997.28
Less: Surtax exemptions		$ 1,500.00
Balance (surtax net income)		$ 95,497.28
Surtax on $95,497.28		$ 63,402.63
Ordinary net income	$ 96,997.28	
Less: Normal tax exemption	875.47	
Balance subject to normal tax	$ 96,121.81	
Normal tax (3 per cent of $96,121.81		$ 2,883.65
Partial tax		$ 66,286.28
Plus: 50 per cent of $3,993.25		1,996.63
Alternative tax		$ 68,282.91

Computation of Tax

Net income adjusted	$100,990.53	
Less: Surtax exemptions	1,500.00	
Surtax net income	$ 99,490.53	

Exhibit A—(Continued)

Computation of Tax—(Continued)

Surtax		$ 66,876.76
Net income adjusted	$100,990.53	
Less: Normal-tax exemption	875.47	
Net income subject to normal tax	$100,115.06	
Normal tax at 3 per cent		3,003.45
Total normal tax and surtax		$ 69,880.21
Alternative tax		$ 68,282.91
Correct income tax liability		$ 68,282.91
Income tax liability shown on return, account No. 9010202		44,181.56
Deficiency of income tax		$ 24,101.35

Received and Filed T.C.U.S. June 1, 1948.

[Title of Tax Court and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above petitioners, admits and denies as follows:

I.

Denies the allegations contained in paragraph I of the petition.

II.

Admits the allegations contained in paragraph II of the petition.

III.

Admits that the tax in controversy is income tax for the taxable year 1944; denies the remaining allegations contained in paragraph III of the petition.

IV.

(A), (B), (C) Denies the allegations of error contained in subparagraphs (A), (B) and (C) of paragraph IV of the petition.

V.

(a) to (e), inclusive. Denies the allegations contained in subparagraphs (a) to (e), inclusive, of paragraph V of the petition.

VI.

Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioners' appeal denied.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel,
T. M. MATHER,
W. J. McFARLAND,
Special Attorneys,
Bureau of Internal Revenue.

Received and Filed T.C.U.S. July 21, 1948.

[Title of Tax Court and Cause.]

AMENDMENT TO PETITION

The petition in the above entitled proceeding is hereby amended in the following respects:

Paragraph IV of the petition is amended by adding thereto subparagraph (D) to read as follows:

"(D) If the Court determines that a portion of the proceeds received from the sale of said agricultural property, as indicated above, constituted ordinary income and not capital gain, then the respondent erred in not allocating to the sale of the unmatured crop a proportionate part of the selling expenses of $10,232.50, one-third of which, or $3,410.83, is allocable to petitioner M. Gladys Watson."

Paragraph V of the petition is amended by adding thereto subparagraph (f) to read as follows:

"(f) The selling expenses incurred in the sale of said agricultural property amounted to $10,232.50. If the Court finds that any portion of the total gross sales price of $197,811.00 is allocable to the growing crop of fruit herein above referred to, and that said proceeds should be treated as ordinary income, then petitioners allege that a portion of said selling expense should also be allocated to said growing crop of fruit in at least the same proportion that the amount of the total gross sales price allocated to said growing crop bears to the total gross sales price."

Dated December 1, 1949.

A. CALDER MACKAY,
ARTHUR McGREGOR,
HOWARD W. REYNOLDS,
ADAM Y. BENNION,
JOHN C. MACKAY,
CHARLES J. HIGSON,

/s/ By ARTHUR McGREGOR,
Counsel for Petitioners.

State of California,
County of Orange—ss.

Ernest A. Watson and M. Gladys Watson, being duly sworn, say:

That they are the petitioners named in the foregoing petition; that they have read the said petition and know the contents thereof; that the same is true of their own knowledge, except as to those matters which are stated therein on information or belief, and as to those matters they believe them to be true.

/s/ ERNEST A. WATSON
/s/ M. GLADYS WATSON

Subscribed and sworn to before me this 1st day of December, 1949.

/s/ CARL C. COWLES,
Notary Public in and for said County and State

Filed at Hearing T.C.U.S. December 6, 1949.

[Title of Tax Court and Cause.]

ANSWER TO AMENDMENTS TO PETITION

The Commissioner of Internal Revenue, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, for answer to the amendments to the petition of the above-named taxpayers, admits and denies as follows:

IV.

(D) Denies the allegations contained in subparagraph (D) of paragraph of the amendments to the petition.

V.

(f) Denies the allegations contained in subparagraph (f) of paragraph V of the amendments to the petition.

Denies each and every allegation contained in the amendments to the petition not hereinbefore specifically admitted or denied.

/s/ CHARLES OLIPHANT, E.C.C.
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.
E. C. CROUTER,
A. J. HURLEY,
Special Attorneys,
Bureau of Internal Revenue.

T.C.U.S. Filed at Hearing Dec. 6, 1949.

[Title of Tax Court and Cause.]

FINDINGS OF FACT AND OPINION, AND DISSENTING OPINION

Promulgated December 7, 1950

1. The petitioner and her brothers were the operating owners of an orange grove property comprising land, trees, a growing crop of oranges on the trees and other property employed in the operation, which they sold for a lump sum. Held, that the growing crop of oranges was not real property used in the petitioner's trade or business within the meaning of that term as used in section 117(j) of the Internal Revenue Code, and further that the crop constituted property held by petitioner primarily for sale to customers in the ordinary course of her trade or business and the gain realized upon the sale thereof is not under that section to be considered as capital gain.

2. Portion of total selling price allocable to the crop of oranges determined.

3. Held, that a proportional part of the expenses incurred in selling the total properties is to be allocated to the crop.

Arthur McGregor, Esq., and Charles J. Higson, Esq., for the petitioners. A. J. Hurley, Esq., for the respondent.

The respondent determined a deficiency of $24,101.35 in the income tax of the petitioners for 1944. The issues are: (1) Whether a portion of the pro-

ceeds received by petitioner, M. Gladys Watson, from the sale of her one-third interest in a citrus grove with the growing fruit thereon is to be allocated to the fruit and regarded as ordinary income, (2) if so, what portion is to be so allocated, and (3) whether the expenses of the sale should also be allocated between the fruit and the other property sold.

FINDINGS OF FACT

A portion of the facts were stipulated and are found accordingly.

At all times material hereto petitioners, Ernest A. Watson and M. Gladys Watson, were married and living together. For 1944 they made a joint income tax return which was filed with the collector for the sixth district of California.

In 1944 Mrs. Watson, sometimes referred to as the petitioner, and her brothers, W. Todd Dofflemyer and Louis L. Dofflemyer, each owned an undivided one-third interest in a 115-acre tract of land consisting of a 110-acre navel orange grove and a 5-acre peach orchard situated near Exeter, Tulare County, California, together with the improvements and equipment thereon. The foregoing land, sometimes hereafter referred to as the Dofflemyer ranch, was acquired about 1912 by the petitioner's father. After the father's death in 1928 the ranch was held by a family holding corporation which was liquidated about the end of 1941 and the property distributed to petitioner and her brothers. As of January 1, 1942, the date of acquisition, they set up the land and im-

provements on their books at an estimated fair market value of $55,649.44. From and after January 1, 1942, petitioner and her brothers operated the ranch under a partnership agreement. The brothers had supervised or managed the ranch since 1912 or 1913.

About May or June 1944, the petitioner and her brothers listed with H. C. Balaam, a local real estate agent, the Dofflemyer ranch and an 80-acre vineyard with a packing house on it for sale at a lump sum price of $329,100 for the properties. After attempting to sell the properties Balaam obtained an offer of $132,000 for the vineyard property. Thereupon petitioner and her brothers withdrew the vineyard from sale and agreed that the asking price for the ranch should be $197,100, or the difference between the asking price for all the properties and the amount of the offer for the vineyard property. In his efforts to sell the ranch, Balaam, in June 1944, contacted J. W. C. Pogue of Exeter. Pogue had lived in the Exeter vicinity all of his life. He had been the owner of citrus fruit property, and had been in the citrus fruit business since 1907. Since the middle 1920's he had owned property adjacent to the ranch. Before reaching a decision on the matter Pogue desired to wait in order to determine as accurately as possible about what the orange crop would be and also wanted to have petitioner and her brothers bear as much of the production costs of the crop as possible.

Pogue examined the production records of the Dofflemyer ranch for the preceding year broken

down into the various sizes of oranges and the quantity of culls. He went over the property at different times with men from his organization for the purpose of estimating what the orange crop would be. During the first part of August and after having estimated a crop of possibly 80,000 loose boxes of oranges and discounting that amount to 70,000 boxes to be on what he considered the safe side, and after considering orange market conditions current in 1944 and estimating that the proceeds from the orange crop would net about $120,000 after providing for further cultivation costs, picking, etc., Pogue decided to buy the ranch at the asking price of $197,100. On August 10, 1944, Louis L. Dofflemyer who personally had been supervising the ranch since 1913 and was thoroughly familiar with it estimated that the crop of oranges on the trees would produce 70,000 loose boxes. On the same day, August 10, 1944, an agreement was entered into between petitioner, her brothers, and Pogue whereby Pogue agreed to buy the ranch for $197,100, $10,000 cash being paid at that time and $187,100 being payable on or before September 1, 1944. The sellers were to pay all operating costs to September 1, 1944, and taxes and insurance were to be prorated to that date. The proceeds from the peach crop on part of the ranch which was then being harvested went to Pogue who was to bear all expense of harvesting. The growing crop of oranges on the trees also went to Pogue with the land. On or about September 1, 1944, Pogue completed payment for the ranch. In addition he paid $711 for other property on the premises which had not been

included in the sales contract. The principal reason that Pogue purchased the ranch for $197,100 and paid all cash therefor was that he estimated he would realize the net amount of $120,000 from the sale of the orange crop and then would be able to sell the ranch for more than the difference between the purchase price and the proceeds from the sale of the crop. He considered that the selling price of $197,100 for the ranch with the equipment and the growing crop of oranges was below the market value of the properties.

The following is a statement of the assets included in the sale, the date of acquisition, fair market value at the time of acquisition of assets acquired on January 1, 1942, and the cost of those acquired thereafter, depreciation sustained to date of sale, and depreciated basis at the date of sale:

Assets sold	Date of Acquisition	Basis	Depreciation Sustained	Depreciated Basis
Orange grove:				
110 acres of land*	Jan. 1, 1942	$21,030.02	.....	$21,030.02
Trees	Jan. 1, 1942	22,261.03	$ 8,648.71	13,612.32
Peach orchard:				
5 acres of land*	Jan. 1, 1942	1,000.00	.....	1,000.00
Trees	Jan. 1, 1942	254.12	225.87	28.25
Farm buildings	Jan. 1, 1942	950.00	322.66	627.34
Pipelines (oranges)	Jan. 1, 1942	760.10	405.39	354.71
Disc harrow	Jan. 1, 1942	98.46	65.65	32.81
2 Pumping plants	Jan. 1, 1942	461.02	344.58	116.44
6 Wind machines	Jan. 1, 1942	4,835.12	1,841.20	2,993.92
2 Trucks	Jan. 1, 1942	669.28	446.18	223.10
2 Tractors	Jan. 1, 1942	1,039.44	598.56	440.88
Tractor and equip't	Jan. 1, 1942	1,215.48	810.32	405.16
Ditcher	Jan. 1, 1942	22.68	12.11	10.57
2 Spray rigs	Jan. 1, 1942	792.16	528.13	264.03
Orchard heaters	Jan. 1, 1942	139.65	41.39	98.26
Pump	April 17, 1943	1,230.66	153.87	1,076.79

Assets sold (Cont'd)	Date of Acquisition	Basis	Depreciation Sustained	Depreciated Basis
Oil tank	July 30, 1943	588.60	63.79	524.81
Nursery tank for spray rig	Sept. 7, 1943	152.00	30.39	121.61
Total		$57,620.70	$14,538.80	$42,961.02

* Included in the land are pipelines, stands, valves, together with 28.75 inches ditch water rights of the Foothill Ditch Company.

At the time of the sale there were 11,556 trees on the 110-acre grove of navel oranges and 496 trees on the five acres of peach orchard. The orange grove was planted about 1896. It is the oldest grove in the Exeter area and is among the best. The soil is well suited for citrus trees and the ranch has sufficient water available for irrigation. The petitioner and her brothers followed excellent farming methods and practices and the annual per acre production from the grove was about twice the average per acre production for Tulare County. However, many of the trees were affected by a scaly bark condition (a condition different from the scale that gets on the oranges) which eventually necessitates replanting of the trees. Due to improvements made in navel orange stock since the planting of the Dofflemyer grove the quality of the fruit from that grove was to some extent inferior to oranges produced on younger navel orange groves. The orange trees were planted 20 feet apart which resulted in overlapping of the trees with a consequent disadvantage in cultivating and growing operations compared with groves planted under later practice with trees farther apart.

The following is a statement of the number of loose boxes of oranges produced on the Dofflemyer ranch, gross income received, cultivation and operating expenses, picking and hauling expenses, total expenses, net income and the average of the foregoing items for the years 1934 through 1943:

Year	Loose boxes Produced*	Gross Income	Cultivation and operating Expenses	Picking and hauling Expenses	Total Expenses	Net income or (loss)
1934	63,502	$ 35,986.96	$ 13,228.29	$ 5,786.22	$ 19,014.51	$ 16,972.45
1935	24,461	23,049.54	13,418.80	2,179.10	15,597.90	7,451.64
1936	49,653	32,047.16	13,431.90	5,215.30	18,647.20	13,399.96
1937	51,031	25,285.97	14,648.46	5,012.32	19,660.78	5,625.15
1938	44,907	22,449.23	15,343.72	4,324.22	19,667.94	2,781.29
1939	43,443	15,461.14	17,836.55	3,840.43	21,676.98	(6,215.84)
1940	60,963	39,910.23	17,126.47	5,423.86	22,550.33	17,359.90
1941	78,216	51,606.64	20,268.52	9,241.72	29,510.24	22,096.40
1942	54,939	82,521.17	21,163.04	11,568.03	32,731.07	49,790.10
1943	79,851	136,808.71	26,217.52	18,438.14	44,655.66	92,153.05
Total	550,966	$465,126.75	$172,683.27	$ 71,029.34	$243,712.61	$221,414.14
Aver. for 10 yrs.	55,097	46,512.68	17,268.33	7,102.93	24,371.26	22,141.42

* Usually three loose boxes of oranges produce two packed boxes.

The average selling price per loose box of oranges for the 10-year period 1934 through 1943 was 84.42 cents and the average cost per box for picking and hauling for that period was 12.89 cents.

As navel oranges bloom in the spring the small fruit forms on the trees. During May and June, particularly the latter month, a considerable portion of the small fruit thus formed drops from the trees. After that has occurred, usually around July 1 in the Exeter area, the orange crop is said to become "set." Navel oranges in the Exeter area generally mature and are ready for picking early in November. From the time the crop is "set" until it is picked and marketed navel oranges are subject to various types of scale and pests, which, if not controlled, may damage the fruit and render it unmarketable. However, losses from scale and pests on groves which are operated by experienced growers and which receive ordinary care do not present any substantial problem commercially. The Dofflemyer ranch losses from such sources for 1943 amounted to approximately two per cent of the total crop. Under normal conditions a grove which has generally produced large-sized fruit will produce that type of fruit each year. After the first of September there is little that is likely to happen to the quality of the fruit. It is possible for one experienced in orange growing and familiar with a given grove to estimate with a reasonable degree of certainty during August and Sep-

tember what the production of the grove for the year will be.

The most damaging element to an orange crop in the Exeter area is frost. Generally, the frost period extends from about December 10 to January 15 or 20. In a normal year there are usually a few nights when it is necessary to take some means of protection against frost. Prior to completion of the installation of wind machines on the Dofflemyer ranch, in 1939, frosts were severe enough on an average of once in every four years to cause damage to the orange crop. Thereafter, and until the sale of the ranch in 1944, the wind machines provided protection from the frosts that occurred and no frost damage was sustained. On an average, severe frosts or freezes occur about once in ten years and some damage can be expected despite the use of protective devices on the grove. However, the wind machines and smudge pots on the Dofflemyer ranch were sufficient to provide adequate protection against frost damage except in periods of record-breaking low temperatures of long duration. Usually a large part of the navel orange crop is picked before a damaging frost is normally expected. Under the prorate system, which was in effect in 1944, and under which an orange grove owner picks only an allotted quantity of oranges each week, the period for picking a crop lasts from eight to ten weeks so that some of the matured fruit is exposed to frost risks for a longer time. However, matured oranges are less susceptible to frost damage than unmatured oranges.

During the frost period of 1944-1945 there was not enough frost to do any damage to the navel orange crop. During the 1948-1949 period the Exeter area experienced the worst freeze in the history of the weather bureau for northern California. That season Pogue did not pick 25 acres of oranges on the Dofflemyer ranch because of damage from freezing. The last previous freeze occurred in 1937. A factor influencing W. Todd Dofflemyer to sell the ranch was the possibility of a freeze during the 1944-1945 season, which would render some portion of the then growing orange crop valueless. While there are risks or hazards in the growing of navel oranges, they are no greater in that industry than they are in many other agricultural or fruit-growing operations.

About one-half of the pipelines on the Dofflemyer ranch were installed during the years 1914 through 1918 and the balance from 1932 to 1937. They were of an old type cement pipeline and had crumbled largely to sand in many places. Although at the time of the sale they were serving the purpose for which they were installed, they were merely a lining in many places and would not withstand heavy tractors passing over them.

The wind machines had been put in during the years 1935 to 1939. They were single type machines and cost about $2,300 or $2,400 each at the time of installation. They were in good operating order. The trucks and tractors were all four years old or older. The pump in one of the pumping plants was installed in 1933, while that in the other plant was

installed in 1938. At the time of the sale they were in good condition.

The cost of cultivation in 1944 of the orange crop to September 1 was $16,020.54, and was taken as an expense deduction by the operating partnership in its return of income for 1944.

During the years 1943 and 1944 the market for oranges was at a very high level with ceiling prices being in effect for the oranges produced in those years. Growers could expect to receive the ceiling price plus premiums under certain conditions for first grade fruit, the ceiling price for the balance of their first grade fruit and some second grade fruit, and an over-all average of near ceiling price for all marketable fruit. The average selling price of the oranges produced on the Dofflemyer ranch in 1943 was $1.71 per loose box, picking and hauling costs were 23 cents per box, thus indicating a value on the tree at maturity of $1.48 per box.

Before the prorate system of picking and marketing oranges became effective cash buyers of unmatured and matured orange crops on the trees operated more extensively than they have since. It was not uncommon in the Exeter area before the beginning of the prorate system for purchases of unmatured orange crops on the trees to be made during September, and in at least one instance, a purchase was made as early as July. Because of the large profits which cash buyers expect to realize from their purchases owners who sell to them do not realize as much from their crops as if they held them and sold through consignment organizations. More

than 95 per cent of the orange crops in the Exeter area are marketed through such organizations.

At or about September 1, 1944, Pogue had estimates or appraisals made of the Dofflemyer property by three persons familiar with orange groves values in the Exeter area. On the basis of these and an appraisal made by himself, he allocated on his books $120,000 of the purchase price of the ranch to the navel orange crop on the trees, $23,000 to the 115 acres of land, $38,600 to the 110 acres of orange trees, $1,000 to the five acres of peach trees, $6,000 to the wind machines, $3,000 to the pumping plants, and $3,000 to the trucks, tractors, etc., on the property.

Beginning in November 1944, the orange crop on the Dofflemyer ranch was harvested, and produced 74,268 loose boxes from which Pogue received gross proceeds of $146,000. Cultivation costs from September 1 to maturity plus picking and hauling costs amounted to approximately $20,000, thus resulting in a net return of about $126,000 from the sale of the crop.

In her joint income tax return the petitioner reported the sale of her one-third interest in Dofflemyer ranch on September 1, 1944, at a net gain of $48,819.82, fifty per cent of which, or $24,409.91, was included in taxable income as a long-term capital gain. No portion of the petitioner's one-third share of the selling price of the ranch was allocated to the growing oranges on the trees at the time of the sale. In determining the deficiency here involved

the respondent determined that of the reported net gain of $48,819.82 from the sale, $40,833.33 represented petitioner's one-third share of the fair market value of the growing crop of oranges on the trees and that that amount constituted ordinary income and not capital gain.

The expenses of selling the ranch amounted to $10,232.50 of which the petitioner's one-third share was $3,410.83. The latter amount was deducted by the petitioner in computing the capital gain reported from the sale.

The portion of the selling price of the Dofflemyer ranch, $197,100, allocable to the growing crop of oranges on the trees, was $40,000.

OPINION

Turner, Judge: The question here is what portion, if any, of the gain realized by the petitioner upon the sale of the orange grove property is attributable to the growing crop of oranges then on the trees and, if any portion of the gain is attributable to the oranges, whether under section 117 of the Internal Revenue Code it is, or is to be considered as gain from the sale of capital assets.

That the oranges did not constitute capital assets as capital assets are defined in section 117 is at once apparent, and that is so whether the oranges be regarded as an inseparable part of the trees and therefore real estate used in petitioner's trade or business, as claimed by her, or as property held by the taxpayer primarily for sale to customers in the ordinary course of her trade or business, as claimed

by respondent, since by the specific language of section 117(a) of the Code[1] both real estate used in the trade or business and property held primarily for sale to customers are excluded from the definition of capital assets. It is the claim of the petitioner, however, that section 117(j)[2] applies, and that if

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[1] Sec. 117. Capital Gains and Losses.

(a) Definitions.—as used in this chapter—

(1) Capital Assets.—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(1), * * * or real property used in the trade or business of the taxpayer.

[2] (j) Gains and Losses From Involuntary Conversion and From the Sale or Exchange of Certain Property Used in the Trade or Business.—

(1) Definition of property used in the trade or business.—

For the purposes of this subsection, the term "property used in the trade or business" means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(1), held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business. * * *

(2) General Rule.—If during the taxable year,

any part of the gain from the sale of the property as a whole was properly attributable to the oranges on the trees at the time of sale, it was gain realized from the sale of real estate used by her and her brothers in their business of owning and operating the orange grove property and under that section gain realized from the sale of real property used in a taxpayer's trade or business is to be considered as if it were gain from the sale of a capital asset. In developing this contention, the petitioner argues first that this is a case which turns on the nature and character of property rights and that in such cases state law is controlling, and second, that under California law and the general law of most states, oranges growing on the trees at the time of sale of an orange grove property constitute a part of the real property.

One difficulty with that argument is that there is no hard and fast rule under California law or, so far as we have found, under the law of any state, unless it be Georgia, that a growing crop of oranges or any other growing crop is, or is not, to be regarded as a part of the real estate.

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the recognized gains upon sales or exchanges of property used in the trade or business, * * * exceed the recognized losses from such sales, exchanges * * * such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets." * * *

The Civil Code of California (Deering 1933) provides as follows:

§658. Definition of real property. Real or immovable property consists of:

1. Land;

2. That which is affixed to land;

3. That which is incidental or appurtenant to land;

4. That which is immovable by law; except that for the purposes of sale, emblements, industrial growing crops and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale, shall be treated as goods and be governed by the provisions of the title of this code regulating the sale of goods.

§659. Land. Land is the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance.

§660. Definition of fixtures. A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; * * * except that for the purposes of sale, emblements, industrial growing crops and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale, shall be treated as goods and be governed by the provisions of the title of this code regulating the sale of goods.

Under California law, fruit trees are not growing crops, but the word "crop" includes fruit grown on such trees. Cottle vs. Spitzer, 65 Cal. 456, 4 Pac.

435; Story vs. Christin, 14 Cal. (2d) 592, 95 Pac. (2d) 925.

Wilson vs. White, 161 Cal. 453, 119 Pac. 895, involved an action for specific performance brought by the purchaser under a contract of sale of an orange grove with oranges on the trees which oranges the seller had reserved under the terms of the contract. There it was said:

While for some purposes growing crops are considered personal property, it is practically elementary law that, as between the vendor and vendee of real property having a growing crop thereon, such crop constitutes a part of the realty (unless there has been a constructive severance), and in the case of a voluntary conveyance of the land passes to the grantee unless specially reserved by the grantor.

And while there are some authorities holding that an oral exception or reservation of the crop is effective in such a case, the weight of authority as well as the better reasoning are to the effect that, where a writing is essential to the transfer of real property, such a reservation cannot be established by parol to impair the effect of the writing purporting to convey the land without reservation. See 8 Am. & Eng. Ency. of Law (2d Ed.) pp. 303, 306. And this court appears to have committed itself to this doctrine in Fisk vs. Soule, 87 Cal. 313, 25 Pac. 430, where it was substantially said that a written contract for the sale of land which did not contain any reservation of the crops bound the grantor to include the crops in his conveyance, notwithstanding an oral understanding that the crops were not to be

included, "unless corrected on the ground that by mistake it was not in accordance with the agreement actually made." * * * (Emphasis supplied.)

In Young vs. Bank of California, 88 Cal. App. (2d) 184, 198 Pac. (2d) 543, a real estate broker sought to collect a commission on a sale of an orchard with the growing crops thereon for $125,000. In the negotiations the purchaser insisted on purchasing the properties separately, $57,500 to be paid for the crops and $67,500 to be paid for the land, in order to comply with Federal income tax regulations covering the payment of income taxes on capital gains, as distinguished from income. Having no written contract with the seller covering the transaction and being faced with the bar of statute of frauds, the broker contended, among other things, that he should be compensated at least for the sale of the growing crops because they did not come under the bar of statute of frauds. In denying his contentions, the court said:

* * * The sale was one transaction. The purchase price was segregated between the land and the growing crops merely to meet the federal regulations regarding income taxes—to show whether the purchase price of the crops should be treated as capital gains or income. But growing crops under our decisions are a part of the realty until severed just as growing timber is part of the land. Sears vs. Ackerman, 138 Cal. 583, 72 P. 171; List vs. Sandell, 42 Cal. App. 2d 505, 507, 109 P. 2d 376. It is undisputed that throughout all the dealings the parties herein treated the sale of the land and crops as one transaction

and there is nothing in the record indicating that any one of them would have considered the sale of one without the other. There is no basis upon which appellant can make a segregation of the sale of the crops from the sale of the land and his case must stand or fall upon the basis of a single transaction covering the entire property.

From the foregoing, it appears that under California law, for the purposes of sale, fruit on the trees is part of the realty and passes as such to the purchaser upon a sale of the land and trees unless there is a specific provision to the contrary in the contract of sale.

The respondent contends that the line of decisions of the California courts represented by Wilson vs. White, supra, and Young vs. Bank of California, supra, holding that growing crops pass as part of the realty upon sale of the latter, is not determinative of whether the orange crop here involved was or was not real property. Relying on certain decisions involving crop mortgages, he takes the position that the instant orange crop was not real property.

Paragraph 2955 of the Civil Code of California provides as follows:

What personal property may be mortgaged. Mortgages may be made upon all growing crops, including grapes and fruit, and upon any and all kinds of personal property, except the following:

1. Personal property not capable of manual delivery;

2. Articles of wearing-apparel and personal adornment;

3. The stock in trade of a merchant.

Subsequent paragraphs of the Code provide for the manner of mortgaging growing crops.

In Simpson vs. Ferguson, 112 Cal. 180, 44 Pac. 484, it was contended that the provisions of the Code relating to the mortgaging of growing crops did not establish an exclusive method for that purpose and that a mortgage upon the land, with its rents, issues and profits, gave the mortgagee a valid lien on the growing crops on the land. In rejecting the contention, the court said:

* * * In the first place, we think it quite manifest, from the provisions of the Code in question that the legislature intended thereby to provide an exclusive mode for the mortgaging of growing crops, and intended to declare that for such purposes this species of property shall be regarded as a chattel. There is nothing in the statute to indicate that it was not intended to cover every case of a mortgage given upon that class of property. In the second place, while it is perfectly true that growing crops may be either personal or real property, according to circumstances, and while as suggested by respondent, a mortgage of the land gives a lien upon everything that would pass by a grant of the land, which includes crops growing thereon, it is nevertheless well established that such lien, so far as the growing crops are concerned, is limited in its effect to the

crops growing upon and unsevered from the land at the time of foreclosure." * * *

Congdon vs. G. M. H. Wagner & Sons, 207 Cal. 373, 278 Pac. 863, involved the question of whether a mortgage on a crop of grapes, executed and recorded in accordance with the provisions of Section 2955 et seq. of the Civil Code, affected the title to the land upon which the grapes covered by the mortgage was being grown and constituted a lien or charge on the land. In holding in the negative, the court said:

* * * It has, however, been held consistently by this court that growing crops are personal property (Marshall vs. Ferguson, 23 Cal. 65; Davis vs. McFarlane, 37 Cal. 636, 99 Am. Dec. 340), and that crop mortgages made, executed, and recorded under the provisions of section 2955 et seq. of the Civil Code do not affect in any degree the title to the land upon which the crops covered by said crop mortgage are being grown and that the same do not constitute a lien or charge upon the land. (Simpson vs. Ferguson, 112 Cal. 180, 40 P. 104, 44 P. 484, 53 Am. St. Rep. 201; First Nat. Bank vs. Brashear, 200 Cal. 389, 253 P. 143.) It was also early decided by this court that a growing crop of fruit occupied the same relation to the land as a growing crop of grain, and as fructus industriales was personal property which might properly be subjected to a chattel mortgage. * * *

In addition to the contrariety of views taken by the California courts with respect to the character of growing crops in that state, we find that in Massa-

chusetts they are regarded as chattels, Commonwealth vs. Galatta, 228 Mass. 308, 117 N. E. 343, while, in Arkansas, they are treated as real property if planted by the land owner, but personalty to the land owner if planted by his tenant, Western Union Telegraph Co. vs. Bush, 191 Ark. 1085, 89 S.W. (2d) 723. By statute, in Georgia all crops, matured or unmatured, are personalty. Under the statute the word "crops" includes the fruits and products of all plants, trees and shrubs, whether the same be annual or perennial, and also crude gum from a living tree. Code of Georgia Annotated, Sections 85-1901 and 85-1902. Under such statute, it was held that a growing crop of pecan nuts on the trees was personalty and that the crop did not pass as part of realty by sale and conveyance of the land, Miller vs. Jackson, 190 Ga. 668, 10 S.E. (2d) 35. Haines City Citrus Growers' Association vs. Petteway, 105 Fla. 135, 145 So. 183, involved the question of whether fruit crops produced on mortgaged land were subject to the real estate mortgage or to a crop mortgage. There the court said:

Growing citrus fruit crops, such as oranges, grapefruit, and tangerines, which essentially owe their annual existence to cultivation and labor, including fertilizing and spraying for control of insects and diseases which attack and injure the fruit, though products of perennial plants or trees, are chattels, while the trees themselves are part of the realty. * * *

A further illustration of the variety of situations involving growing crops and the conflict of views taken with respect thereto appears in Vought vs.

Kanne, 10 Fed. (2d) 747 (CCA 8). The question there was whether a bankrupt's homestead exemption under the laws of Minnesota included the growing grain crops on the homestead. In holding that the exemption did not extend to such crops, the court said:

Growing crops occupy an unique legal position. They spring from and are physically attached to the land, but are intended to be and may be severed therefrom without injury to the land. When so severed there can be no question that they are then personal property. There is some conflict in the different jurisdictions as to whether such crops, while unsevered, are personalty or realty but the great weight of authority is that unsevered annual crops are personalty. 17 C. J. 379, note 5; 8 R. C. L. 356, notes 13 and 14. This was the common-law rule and it has been followed in most of the American Jurisdictions. 23 L. R. A. (N. S.) 1219, note. However, it is hardly correct to say that any jurisdiction, where there are decisions upon different character of transactions affecting growing crops (such as conveyances, statute of frauds, ejectment, trespass, landlord and tenant, execution levy, attachment, inheritance) has held such crops in all instances and as to all transactions to be either personal property or real property. The determination "depends very greatly on the nature of the transaction in which the question arises." * * *

If, then, the above may be regarded as fairly reflecting the law of California and of other states with respect to growing crops and the disposition

thereof, petitioner's argument, in effect, is that since under the California law of conveyancing oranges on the trees pass with and as a part of the real estate unless specifically reserved or excluded, and since petitioner and her brothers sold the entire property without any reservation of the oranges on the trees, that fact determines the character of the oranges and of any gain realized thereon, for the purposes of section 117 of the Internal Revenue Code, and under subsection (j) thereof, the gain must be considered as capital gain. Correspondingly, it would also follow, if that contention is sound, that if the oranges had been separately sold the gain realized therefrom would have been ordinary gain and not within the scope of section 117. In other words, the method or manner of sale or the form which the sale took would be controlling.

In Helvering vs. Hammel, 311 U. S. 504, however, it was held that the manner in which a sale was effected was not determinative of whether the resulting loss was a capital loss or an ordinary loss. And in Burnet vs. Harmel, 287 U. S. 103, the Supreme Court, pointing out that Congress had enacted the Federal income tax statutes in the exercise of its plenary powers, under the Constitution, to tax income, said:

* * * It is the will of Congress which controls, and the expression of its will in legislation, in the absence of language evidencing a different purpose, is to be interpreted so as to give a uniform application to a nation-wide scheme of taxation. * * * State law may control only when the operation of the

federal taxing act, by express language or necessary implication, makes its own operation dependent upon state law. * * *"

The Court there, as here, was concerned with the character of income as capital gain or ordinary gain, and it went on to say that "For the purpose of applying this section to the particular payments now under consideration, the act of Congress has its own criteria, irrespective of any particular characterization of the payments under local law. See Weiss vs. Wiener, supra, page 337 of 279 U. S., 49 S. Ct. 337, 73 L. Ed. 720. The state law creates legal interests, but the Federal statute determines when and how they shall be taxed."

Accordingly, the fact that under the law of California the oranges on the trees were or were not to be regarded as real property for the purpose of construing the conveyance and for the purpose of determining and concluding rights as between seller and purchaser does not supply the answer to the question here. To the contrary, the answer must be found in the Federal statute, and a reading of that statute plainly shows that it is not whether property is realty or personalty, or is to be regarded as one or the other for certain purposes or in certain circumstances, which determines whether gain realized from the sale thereof is to be taxed as capital gain, but rather it is the purpose for which the property is acquired or held or the use to which it is put that supplies the answer. Real property may or may not be a capital asset, or it may or may not be an asset the gain from the sale of which is, under

section 117(j), to be considered as capital gain. It must likewise be real estate used by the taxpayer in her trade or business, and not only that, but it must be real estate "which is not * * * (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business." In the circumstances here, it is not enough, therefore, merely to find that the growing crop of oranges was real estate or was to be regarded as real estate under local law. It must also be found that the oranges did not constitute property held primarily for sale to customers in the ordinary course of her trade or business.

That in the instant case the oranges, exclusive of the land, trees and improvements, did in fact constitute a distinct and important item or element in the lump sale which occurred, is not, in the light of the evidence, now open to question. Petitioner and her brothers, back in May or June, at the time the orange trees were blooming or the blossoms were dropping, had offered the property at the price later obtained, but had received no takers and, as far as we know, no counter offers. Pogue was approached but was not interested until he could determine as accurately as possible the extent of the current crop. He also wanted to avoid, as much as possible, the burden and cost of cultivating the crop. It was only after the oranges had reached the stage at which satisfactory estimates of the crop could be made that a sale was negotiated. During negotiations or at or about the time of the closing of the contract, and for the apparent purpose of having a record of what

was sold, Louis L. Dofflemyer, who had been manager of the grove for many years, made a survey and estimated that the crop on the trees would be approximately 70,000 loose boxes of oranges, normal crop conditions thereafter being granted. The harvest later proved the estimate to be very sound. As far as Pogue was concerned, the quantity and condition of the oranges, plus the price anticipated when the crop should reach maturity, supplied to him the controlling inducement for buying the entire property at the price paid, and for cash. On the basis of his experience that freeze years occurred in cycles, W. Todd Dofflemyer, who negotiated the sale, felt certain that the season of 1944-1945 would be a freeze year and desired to cash in before cold weather, letting the purchaser run the risk of crop loss due to frost. His testimony, in effect, was that if he had not thought there would be a crop loss due to frost, and had thought they would have received ceiling price for the oranges, he would not have sold but would have held the property. In other words, all the parties to the sale did, in fact, regard the oranges as a crop of fruit on the trees, and not as trees or land. Pogue was buying oranges which he planned to harvest and sell to customers. Petitioner and her brothers were selling their crop of oranges for cash in hand, allowing to the purchaser the added revenue if they reached maturity without loss and the high prices continued.

That farmers, fruit growers, and the like regard, think of and deal with their crops, whether growing or mature, as being something apart from or

other than the land itself, is, we think, so generally known and accepted as to require no discussion or amplification here. The crop is their stock in trade and from the time the fruit appears on the plant, vine, or tree, it is thought of in terms of the units by which it is measured for sale and of the anficipated prices per unit. In short, the primary purpose and objective of the farmer or fruit grower is the sale of his crop to some customer or customers. It is, of course, true that in some instances a crop may not be held primarily for sale to customers, but rather for use in processing, developing, or producing some other commodity for marketing, as in the case of corn or other grain grown for the purpose of conversion into beef or pork, which in turn becomes the commodities held primarily for sale to customers. But here we have no such a case.

The petitioner argues, however, that the oranges in this instance were not held primarily for sale to customers in the course of her trade or business, because she and her brothers were in the business of producing and selling ripe oranges and not in the business of producing and selling green oranges. Granting that petitioner and her brothers had never before sold their oranges prior to maturity, that fact in no way negatives the proposition that the oranges were held primarily for sale by them in the ordinary course of their business. It is fundamental, we think, that the grower, all factors being considered, seeks to sell his crop at the time and in the manner he considers to his best advantage, and while the evidence indicates that since the development

of better protective devices against the natural hazards of orange growing and the advent of the compulsory "prorate" method of harvesting oranges, there have been no known sales of crops of oranges prior to maturity in the area in which the property herein was located, we are unable to see how the holding of the oranges primarily for sale to customers is changed to a holding primarily for some other purpose because the grower manages to realize his purpose to sell by making a sale to his liking before the oranges are mature, or because as a part of the same transaction the land was also sold.

On the basis of the picture presented, it is our conclusion, and we hold, that the oranges sold by petitioner and her brothers did not constitute real estate used by them in their trade or business which was "not * * * (B) property held by [them] primarily for sale to customers in the ordinary course of [their] trade or business," and accordingly, the provisions of section 117(j) do not apply.

Petitioner cites and relies on Albright vs. U. S., 173 Fed. (2d) 339; Fawn Lake Ranch Co., 12 T.C. 1139; Isaac Emerson, 12 T.C. 875; Butler Consolidated Coal Co., 6 T.C. 183; Camp Manufacturing Co., 3 T.C. 467; and J. J. Carroll, 27 B.T.A. 65, aff'd., 70 Fed. (2d) 806. Those cases are distinguishable, and are not controlling here. Butler Consolidated Coal Company was the case of a taxpayer engaged in the business of mining coal. The property sold was land from which it had at one time mined coal and which still contained some coal. The mining

operation had been abandoned some eleven years prior to sale of the property and the mine had been allowed to fill with water. It was held that the coal in place was not held primarily for sale to customers in the course of the taxpayer's trade or business. Camp Manufacturing Company and J. J. Carroll are cases involving the sale of tracts of standing timber by owners who were engaged in the manufacture and sale of lumber. The opinion in each of those cases pointed out that the principal business of the taxpayer was the using of timber in the manufacture of lumber, and not the sale of timber tracts themselves. In the instant case, the petitioner was never engaged in the business of using oranges for the purpose of producing another product. Her business was that of producing oranges for sale to customers. Though the oranges passed through various stages of growth from bloom to maturity, at each stage they were held for one and the same primary purpose, namely, for sale to customers, and never at any stage of operation were the oranges held for or devoted to any other purpose. The Albright, Emerson and Fawn Lake Ranch cases are as to the instant case even more remote. There, the petitioners were in the dairy, livestock or cattle business, and the sales involved were sales of animals culled from breeding and dairy herds. In those cases, the animals in question were not held primarily for sale, but for the purpose of producing the animals and other products which were held primarily for sale. To make those cases comparable to the instant case, it would be necessary for us here to be dealing with

gains realized by petitioner and her brothers from the sale of the orange trees themselves.

Since the orange crop was not a capital asset, the portion of the total selling price allocable thereto is to be treated as an amount received from the sale of a noncapital asset. In determining the deficiency the respondent determined the portion of the total selling price allocable to the orange crop to be $122,500, and the petitioner's one-third share thereof as $40,833.33. On brief, he contends that the portion allocable to the crop was not less than $120,000. The petitioner contends that the allocation of $10,700 would be reasonable and in no event should such allocation exceed $16,000.

Each of the parties produced a number of witnesses who gave testimony bearing on the value of the various properties including the orange crop at the time sold. Values expressed for the orange crop ranged from a low of approximately $4,000 to a high of approximately $120,000. In general, the values for the orange crop expressed by petitioner's witnesses were substantially below the amount expended to the time of the sale for the production of the crop. On the contrary, they placed substantial values on the other assets included in the sale. The respondent's witnesses, on the other hand, placed much higher values on the crop and substantially lower values on the other assets. The top value now contended for by the petitioner for the orange crop, namely, $16,000, is approximately the amount expended to the date of the sale in the production of the crop, while the $120,000 value contended for by the respondent is about $6,000 less than the net amount realized by

Pogue after he had held the crop to maturity and gathered and sold it. From a consideration of all the evidence bearing on the question, we are of the opinion that the portion of the total selling price properly allocable to the orange crop was $40,000, and have so found as a fact.

The remaining issue is whether the total selling expenses of $10,232.50 should be allocated between the crop of oranges and the other assets sold. No such allocation was made by the respondent in determining the deficiency. However, on brief, he concedes that such expenses should be allocated between the crop and the other properties in the proportion that the portion of the total selling price allocable to each bears to the total selling price. Since the respondent's concession disposes of the issue, we hold for the petitioner as to it.

Reviewed by the Court.

Decision will be entered under Rule 50.

Black, J., dissenting: I agree with the majority opinion that what is a capital asset in determining whether the gain from the sale of property shall be taxed as capital gain or as ordinary income depends on statutory definition as written by Congress. It is not governed by state law. Congress, of course, could tax all income from the sale of capital assets as ordinary income if it chose to do so. The term "income" as used in the Constitution and income tax laws has been defined by the Supreme Court as "the gain derived from capital, from labor, or from both

combined, provided it be understood to include profit or gain from a sale or conversion of capital assets." Stratton's Independence vs. Howbert, 231 U.S. 399; Doyle vs. Mitchell Bros., 247 U.S. 179; Eisner vs. Macomber, 252 U.S. 189. But Congress has elected to provide in section 117 of the Internal Revenue Code that gains from the sale of certain property shall be taxed as long-term capital gains and that only 50 per cent of the gain shall be taken into account for the computation of income tax. Generally the term "capital assets" as defined by Congress includes all classes of property not specifically excluded in the statutory definition. The term is defined in the statute, as follows:

Sec. 117. Capital Gains and Losses.

(a) Definitions.—As used in this chapter—

(1) Capital Assets. — The term "capital assets means property held by the taxpayer (whether or not connected with his trade or business), but does not include—

(A) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;

(B) property, used in his trade or business, of a character which is subject to the allowance for depreciation provided in section 23(1), or real property used in his trade or business; * * * * *

* * * * *

At the outset, I wish to make it plain that I do not question the feasibility of dividing the sale which

took place here into its component parts. I accept as correct the doctrine in Williams vs. McGowan, 152 Fed. (2d) 570, where taxpayer sold a hardware business as a going concern, including accounts receivable, fixtures, and merchandise inventory, that the whole business was not to be treated as a single piece of property representing "capital asset" for income tax purposes, but the sale would be comminuted into its fragments and there would be separately matched against the definition in the statute of capital assets.

It is perfectly clear to me that in the instant case Pogue, the purchaser, bought himself a growing orange crop when he made the purchase here involved. I am also willing to believe that the growing orange crop had a fair market value of $40,000 at the time of sale and that as found by the majority "The portion of the selling price of the Dofflemyer ranch, $197,000, allocable to the growing crop of oranges on the trees, was $40,000." But that does not, in my opinion, solve the problem which we have here. The problem is whether this growing crop of unmatured oranges on the trees is excluded from the definition of "capital assets" by the exceptions enumerated in section 117. I do not think they are excluded. Clearly, the immature oranges which were on the trees at the time petitioner sold them were not "stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year" as those terms are used in section 117. Were they "property held by the taxpayer

primarily for sale to customers in the ordinary course of his trade or business" (emphasis supplied) as provided in section 117(a)(1)(A)? If they were, then the majority opinion is correct because its conclusions are based on that particular provision of the statute and the majority has made an affirmative finding that the unmatured oranges were "property held by the taxpayer primarily for sale in the ordinary course of his trade or business." But I think there is much force in petitioner's contention as stated in the majority opinion, as follows:

> The petitioner argues, however, that the oranges in this instance were not held primarily for sale to customers in the course of her trade or business, because she and her brothers were in the business of producing and selling ripe oranges and not in the business of producing and selling green oranges. * * *
>
> Of course, it goes without saying that if a producer of oranges, such as was petitioner in the instant case, sells the oranges on the trees after they have matured the income therefrom would be ordinary income and not capital gain. She would be selling property held primarily for sale to customers in the ordinary course of her trade or business. That business was the growing and selling of ripened oranges. In other words, she would not have to pick them off the trees and sell them after they were picked in order for the income to be taxed as ordinary income. The ordinary income provisions of the statute would be quite as effective in cases of selling fruit matured, still unpicked on the trees, as it would

be in selling the fruit after it was picked—I certainly concede that fact. But where, as here, the land is sold, together with the producing orange trees and the immature oranges on the trees, it seems to me the situation is different. In that sort of a situation the property sold is "real property used in the trade or business of the taxpayer" as used in the last sentence of section 117(a)(1).

If I am correct in this assumption, then section 117(j) is applicable which was added as an amendment by section 151(b) of the 1942 Act. Subsection (j) which was thus added reads, as follows:

(j) Gains and Losses From Involuntary Conversion and From the Sale or Exchange of Certain Property Used in the Trade or Business.—

(1) Definition of property used in the trade or business.—For the purposes of this subsection, the term "property used in the trade or business" means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(l), held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, * * *.

(2) General rule.—If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business, * * * exceed the recog-

nized losses from such sales, exchanges, * * * such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets. * * *

If section 117(j) is applicable to the sale of the entire property here, as I think it is, then even though it is possible to divide the sale into component parts as the majority opinion does, petitioner's entire gain from the sale is taxable as long-term capital gain as petitioner contends and the gain from the sale of the unmatured oranges is not ordinary income as the Commissioner has determined and the majority opinion holds.

Of course, it is perfectly true that Congress by appropriate definition could exclude gain from the sale of unmatured crops, such as we have here, from the benefits of the capital gains provisions of the statute, but I do not think it has done so when the statutory definitions and exceptions are given their ordinary and commonly understood meaning.

I would, therefore, sustain petitioner in her contention that the gain from the sale of the unmatured orange crop here involved should be taxed as long-term capital gain and not as ordinary income. I, therefore, respectfully dissent.

Harron, J., agrees with this dissent.

The Tax Court of the United States
Washington

Docket No. 18856

ERNEST A. WATSON and M. GLADYS WATSON,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the Court's Findings of Fact and Opinion promulgated December 7, 1950, the respondent, on January 23, 1951, having filed a proposed recomputation of the tax involved in accordance therewith, and this proceeding having been called from the motion calendar of February 14, 1951, for settlement under Rule 50, at which time the petitioners offered no objection to the respondent's recomputation, it is

Ordered and Decided: That there is a deficiency in income tax for the year 1944 in the amount of $6,920.35.

Entered: February 15, 1951.

[Seal] /s/ BOLON B. TURNER,
Judge.

Served February 16, 1951.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It Is Hereby Stipulated and Agreed by and between the parties hereto, by and through their respective counsel, that the following facts shall be taken as true, without prejudice to the right of either party to introduce other and further evidence not inconsistent therewith:

1. At all times material hereto, petitioners, Ernest A. Watson and M. Gladys Watson, were married and lived together as husband and wife, residing at Santa Ana, California.

2. For the year 1944 petitioners filed with the Collector of Internal Revenue for the Sixth District of California, a joint income tax return covering items of income and deductions for both petitioners.

3. During the year 1944 M. Gladys Watson, one of the petitioners herein, owned an undivided one-third interest in certain agricultural land consisting of approximately 110 acres of orange grove and five acres of peach orchard located near Exeter, County of Tulare, State of California, together with improvements and equipment located thereon. During the latter part of the year 1944, said property was sold to one J. W. C. Pogue. The total sales price was $197,811.00, consisting of $197,100.00 paid through escrow, and $711.00 paid outside of escrow for addi-

tional equipment. The expenses of sale were $10,232.50 and the net proceeds were $187,578.50. One-third of this amount, or $62,526.17, was received by petitioner, M. Gladys Watson.

4. Petitioners' son, Donald G. Watson, and his wife, Llewellyn A. Watson, had no interest in the above property which was sold, nor the proceeds, if any, attributable to the unmatured crop on the trees.

5. At the date of sale the orange trees had on them an unmatured crop of navel oranges. The peach crop on said property was substantially matured at the date of sale and the proceeds therefrom, amounting to $1,729.74, were turned over to the purchaser in accordance with the terms of the sale agreement. The cost of cultivation of the crop on the orange grove to the date of sale was $16,020.54.

6. There is no controversy between the parties herein regarding the adjusted cost basis of the real estate and improvements and equipment which was sold. All of such properties had a total cost basis to petitioners at dates of acquisition in 1942 and 1943 in the amount of $57,620.70. Depreciation sustained, to the date of sale, amounted to $14,538.80; leaving depreciated basis of all of such properties in the total amount of $42,961.92 of which one-third or $14,330.31 represents the basis to these petitioners in determining the profit on the sale of these properties. This depreciated basis for said properties has been used by the petitioners in their return. The respondent has also used this figure in connection with his de-

termination of the amount of gain and income received from the sale of these properties in 1944.

/s/ CHARLES OLIPHANT ECC
Chief Counsel, Bureau of
Internal Revenue

A. CALDER MACKAY
ARTHUR McGREGOR
HOWARD W. REYNOLDS
ADAM Y. BENNION
JOHN C. MACKAY
CHARLES J. HIGSON

/s/ By ARTHUR McGREGOR,
Counsel for Petitioner

Filed at Hearing T.C.U.S. December 6, 1949.

United States Court of Appeals for the Ninth Circuit

Tax Court Docket No. 18856

ERNEST A. WATSON and M. GLADYS WATSON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REVIEW OF DECISION OF THE TAX COURT OF THE UNITED STATES

To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now the Petitioners, Ernest A. Watson and M. Gladys Watson, and respectfully show:

I.

Nature of the Controversy

Respondent determined a deficiency in the income tax liability of petitioners, Ernest A. Watson and M. Gladys Watson, for the calendar year 1944, in the amount of $24,101.35. Petitioners filed a petition with The Tax Court within the time allowed, and the proceeding was heard at Los Angeles, California, on December 6, 7, 8, and 9, 1949, by the Honorable Bolon B. Turner, Judge of The Tax Court. The Tax Court entered its decision on February 15, 1951, ordering and deciding that there is a deficiency

in income tax for the year 1944 in the amount of $6,920.35.

The issues presented below were: (1) whether the Commissioner erred in allocating the sales price of an orange grove having immature oranges on the trees, and in treating the part of the sales price allocated to the immature growing oranges as ordinary income and not capital gain; and (2) in the event that an allocation of sales price should be made whether the Commissioner erred in determining the amount to be allocated to the immature oranges.

Petitioner, M. Gladys Watson, during the year 1944 owned an undivided one-third interest in certain agricultural land consisting of approximately 110 acres of orange grove and five acres of peach orchard located near Exeter, Tulare County, California, known as the "Dofflemyer Ranch," together with improvements, water rights and equipment located thereon. Petitioner and her co-tenants acquired this property on December 31, 1941.

On August 10, 1944, Petitioner, M. Gladys Watson, and her co-owners entered into a contract of sale of this agricultural property, together with the improvements, water rights and equipment thereon, for a lump sum consideration of $197,100.00, of which $10,000.00 was paid at the time of making the contract and the balance of the purchase price was paid on September 1, 1944.

At the date of the sale the trees of the orange grove had on them immature oranges which would not begin to mature until sometime in November and would be picked during a period of eight to ten weeks thereafter. The oranges bloom in the spring,

and during May and June a considerable portion of the blossoms and fruit drop from the trees. The green oranges "set" on the trees (cease to fall) about July 1, or a little over a month prior to the date of the contract of sale.

The sales agreement did not mention a crop of oranges on the trees, but the sale of the grove was treated as a sale of real property. Documentary stamps were attached to the deed covering the entire amount of the consideration paid for the property. In their agreement, the parties made no allocation of sales price, the property selling as a unit for a lump sum of $197,100.00.

Petitioner, M. Gladys Watson, and her two brothers operated the property in question under a partnership agreement. The brothers assumed active management of the property, and they had supervised this particular property ever since 1912. The occupation of the partnership and of the individuals was that of farmers and fruit growers. They were not in the business of selling orange groves. Neither were Petitioner, M. Gladys Watson, and her co-tenants engaged in the business of selling immature fruit on the trees, and they had never made such a sale prior to the time the grove in question was sold on August 10, 1944. It was not the practice in the citrus industry in California to sell oranges on the trees prior to maturity.

Petitioners, on their joint income tax return for the year 1944, reported the gain from the sale of the undivided one-third interest in the orange grove as capital gain from the sale of real property used

in the trade or business of the taxpayer held for more than six months, and falling within the purview of Section 117(j) of the Internal Revenue Code.

The Commissioner of Internal Revenue, applying retroactively his ruling issued in 1946 (I.T. 3815, 1946-2 CB 30), determined that of the amount of $48,819.82 reported as net gain by Petitioner, M. Gladys Watson, from the sale of her one-third interest in the Dofflemyer Ranch, $40,833.33 thereof represented the sales price of the immature fruit, and that the same constituted ordinary income. This would represent a value of $122,500.00 which the Commissioner allocated to the immature fruit on the trees out of a total sales price of $197,100.00 for the Dofflemyer Ranch.

The Tax Court, two judges dissenting, determined that an allocation of the sales price should be made and that the portion of the sales price applied to the immature fruit represented ordinary income. The Court further determined that the portion of the selling price of $197,100.00 allocable to the growing crop of oranges on the trees was $40,000.00.

For a sale to result in a capital gain, the property sold must be a "capital asset." The term "capital asset" includes all property not specifically excluded in Section 117(a)(1) of the Internal Revenue Code. Prior to 1942 depreciable property used in the taxpayer's trade or business was excluded. Real property, however, was considered to be a capital asset. Congress desired to place land and depreciable property used in the trade or business in the same category with respect to gains or losses. As a result, the

Revenue Act of 1942 added Section 117(j), which provides that real estate properties, both land and depreciable property, held for more than six months, are to be treated as ordinary assets and not capital assets. Upon the sale of such assets, if there is a gain, it will be treated as a capital gain; but if there is a loss, it may be taken in full as an ordinary loss against other income.

In order for a sale to be given the beneficial treatment of Section 117(j), the taxpayer must show the following facts:

(1) That the entire property sold was "property used in the trade or business;"

(2) That the entire property sold was "real property" or property which is subject to an allowance for depreciation;

(3) That the entire property sold was "held for more than six months" before sale;

(4) That the property sold was not of a kind "which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year;"

(5) That the property sold was not "held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business."

The citrus trees and land are clearly Section 117(j) assets. Applying the above provisions to the sale of immature oranges, there is little difficulty in satisfying requirements (1), (3) and (4). Clearly the growing and selling of fruit is a trade or business. The entire property including the oranges had been held for more than six months. The immature fruit

was not property of a kind includible in petitioner's inventory.

With respect to point (2) above it is petitioner's position that the nature and character of property rights as defined by the State law is controlling and that under California law and the general law of most states, oranges growing on the trees at the time of sale of an orange grove property constitute a part of the real property.

With respect to point (5) above it is petitioner's position that the immature oranges were not held primarily for sale to customers in the ordinary course of her trade or business because she and her brothers were in the business of producing and selling ripe oranges and not in the business of selling green, immature oranges. Where the land is sold together with the producing trees which have on them the immature oranges, the situation is different. The property sold then is "real property used in the trade or business of the taxpayer" as outlined in (5) above.

The Petitioners are aggrieved by the Findings of Fact and Opinion of The Tax Court and by its Decision, by reason of the determination that any part of the sale proceeds represented sale of property held by the Petitioner, M. Gladys Watson, primarily for sale to customers in the ordinary course of her trade or business, and further, by its failure to hold that the growing trees and immature fruit constituted a unit with respect to which no separate allocation of sales price could be made to the immature fruit.

The Tax Court erred in failing to determine that

the entire property sold constituted real property used in the trade or business of the taxpayer within the purview of Section 117(j) of the Internal Revenue Code, and it also erred in allocating a portion of the sales price to the growing crop.

II.

Court in Which Review Is Sought

The United States Court of Appeals for the Ninth Circuit is the Court in which review of said decision of The Tax Court is sought pursuant to the provisions of Section 1141 of the Internal Revenue Code.

III.

Venue

Pursuant to Findings of Fact and Opinion promulgated December 7, 1950, the Decision of The Tax Court was entered on February 15, 1951. The Petitioners, Ernest A. Watson and M. Gladys Watson, husband and wife, during the year 1944 and for many years prior thereto and thereafter were residents of the City of Santa Ana, State of California. They filed a joint individual income tax return, Treasury Form 1040, for the calendar year 1944 with the Collector of Internal Revenue for the Sixth District of California, whose office is located at Los Angeles, California, and within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, where this review is sought.

The parties hereto have not stipulated that said decision may be reviewed by any Court of Appeals other than the one herein designated.

Wherefore, Petitioners pray that the Findings of Fact, Opinion, and Decision of The Tax Court be reviewed by the United States Court of Appeals for the Ninth Circuit; that a transcript of the record be prepared in accordance with the law and rules of said Court and transmitted to the Clerk of said Court for filing; and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

Dated: May 9, 1951.

/s/ A. CALDER MACKAY
/s/ ARTHUR McGREGOR
/s/ HOWARD W. REYNOLDS
/s/ ADAM Y. BENNION
/s/ RICHARD N. MACKAY
/s/ CHARLES J. HIGSON,
Attorneys for Petitioners.

Filed T.C.U.S. May 11, 1951.

[Title of U. S. Court of Appeals and Cause.]

NOTICE OF FILING PETITION FOR REVIEW

To Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, Washington, D. C.:

You are hereby notified that the petitioners on the 11th day of May, 1951, did file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States

Court of Appeals for the Ninth Circuit of the decision of The Tax Court heretofore rendered in the above entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this 9th day of May, 1951.

/s/ A. CALDER MACKAY
/s/ ARTHUR McGREGOR
/s/ HOWARD W. REYNOLDS
/s/ ADAM Y. BENNION
/s/ RICHARD N. MACKAY
/s/ CHARLES J. HIGSON
Counsel for Petitioners.

Acknowledgment of Service attached.

Filed T.C.U.S. May 11, 1951.

[Title of U. S. Court of Appeals and Cause.[

STATEMENT OF POINTS AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED

Come Now Ernest A. Watson and M. Gladys Watson, Petitioners on review herein, by their attorneys, A. Calder Mackay, Arthur McGregor, Howard W. Reynolds, Adam Y. Bennion, Richard N. Mackay and Charles J. Higson, and state that the points on which they intend to rely in this case are as follows:

1. The Tax Court erred in holding and deciding

that the immature crop on the trees at the date of sale of petitioner M. Gladys Watson's undivided one-third interest in an orange grove, constituted property held by this petitioner primarily for sale to customers in the ordinary course of her trade or business.

2. The Tax Court erred in holding that any part of the gain realized upon the sale of said orange grove represented ordinary income and not to be treated as capital gain.

3. The Tax Court erred in failing and refusing to hold and decide that under the law of the State of California the entire grove, including the immature fruit on the trees, constituted real property used in the trade or business of the taxpayer, held for more than six months and subject to capital gains treatment under Section 117(j) of the Internal Revenue Code.

4. The Tax Court erred in failing to treat the trees and the immature fruit as inseparable, constituting property of the same nature, and in making a separate allocation of the sales price to the immature fruit.

5. The Tax Court erred in that its opinion and decision are contrary to law.

Petitioner hereby designates the entire record, as certified to the Clerk of the above entitled Court pursuant to Designation of Contents of Record on Review as filed herein, as necessary to be printed for the consideration of the points set forth above.

including this Statement of Points and Designation.

Dated: May 25, 1951.

/s/ A. CALDER MACKAY
/s/ ARTHUR McGREGOR
/s/ HOWARD W. REYNOLDS
/s/ ADAM Y. BENNION
/s/ RICHARD N. MACKAY
/s/ CHARLES J. HIGSON
Attorneys for Petitioners.

Acknowledgment of Service attached.
Filed T.C.U.S. May 28, 1951.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON REVIEW

To the Clerk of The Tax Court of the United States:

Come Now the Petitioners on review herein, by their attorneys, A. Calder Mackay, Arthur McGregor, Howard W. Reynolds, Adam Y. Bennion, Richard N. Mackay and Charles J. Higson, and hereby designate for inclusion in the record on review in the above entitled proceeding all matters required by Rule 75(g) of the Federal Rules of Civil Procedure, including the following:

1. Docket entries of the proceedings before The Tax Court.

2. Pleadings:

(a) Petition, including annexed copy of deficiency notice.

(b) Answer.

(c) Amendment to Petition.

(d) Answer to Amendments to Petition.

3. Findings of Fact and Opinion, and Dissenting Opinion promulgated December 7, 1950.

4. Decision entered February 15, 1951.

5. Stipulation of Facts.

6. From the official report of hearing before The Tax Court on December 6, 7, 8 and 9, the following pages:

(a) Testimony of W. Todd Dofflemyer, commencing on page 9, line 17; pages 10, 11, 12 and 13; page 19; pages 40, 41, 42, 43, 44, 45, and first line of 46; 77; 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90 and 91; 370, 371, 372; 375, 376, 377.

(b) Testimony of Wiley D. Ambrose on pages 135, 136, 137; 150 and 151.

(c) Testimony of R. B. Wallace on pages 220, 221, 222, 223, 224, 225, 226 and 227; 232, 233 and 234.

(d) Testimony of J. W. C. Pogue on pages 262; 347, 348, 349, 350; 353.

(e) Testimony of L. L. Dofflemyer on pages 394, 395; 403, 404; 421.

(f) Testimony of Jack M. Dungan on pages 479; 484, 485.

7. Petitioners' Exhibit Nos. 2 and 5.

8. Petition for Review and Notice of Filing Petition for Review.

9. Statement of Points and Designation of Parts of the Record to be Printed.

10. This Designation of Contents of Record on Review.

Wherefore, it is requested that copies of the record as above designated be prepared and transmitted to

the United States Court of Appeals for the Ninth Circuit in accordance with the rules of said Court.

Dated: May 25, 1951.

/s/ A. CALDER MACKAY
/s/ ARTHUR McGREGOR
/s/ HOWARD W. REYNOLDS
/s/ ADAM Y. BENNION
/s/ RICHARD N. MACKAY
/s/ CHARLES J. HIGSON
Attorneys for Petitioners

Acknowledgment of Service attached.

Filed T.C.U.S. May 28, 1951.

[Title of U. S. Court of Appeals and Cause.]

SUPPLEMENTAL DESIGNATION OF RECORD ON REVIEW

To the Clerk of The Tax Court of the United States:

You are hereby requested to prepare, certify, transmit and deliver to the Clerk of the United States Court of Appeals for the Ninth Circuit certified copies of the following documents in addition to those requested by petitioners on review.

1. The complete transcript of the hearing of this proceeding held in Los Angeles on December 6, 7, 8 and 9, 1949, including all exhibits introduced in evidence.

2. This Supplemental Designation.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of Internal Revenue, Counsel for Respondent on Review.

Acknowledgment of Service attached.

Filed T.C.U.S. June 5, 1951.

The Tax Court of the United States
Washington

[Title of Cause.]

CERTIFICATE

I, Victor S, Mersch, Clerk of The Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 15, inclusive, constitute and are all of the original papers and proceedings on file in my office as called for by the "Designation of Contents of Record on Review and Supplemental Designation of Record on Review", in the proceeding before The Tax Court of the United States entitled "Ernest A. Watson and M. Gladys Watson, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Docket No. 18856; and in which the petitioner in The Tax Court proceeding has initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceeding, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 6th day of June, 1951.

[Seal] /s/ VICTOR S. MERSCH,
Clerk, The Tax Court of the
United States.

[Title of Tax Court and Cause.]

TRANSCRIPT OF TESTIMONY

Mr. McGregor: Call Mr. W. Todd Dofflemyer.

W. TODD DOFFLEMYER

was sworn and testified as follows:

The Clerk: State your name and address, please.

The Witness: W. Todd Dofflemyer, and my address is RFD 1, Box 72, Exeter, California.

Direct Examination

Q. (By Mr. McGregor): Mr. Dofflemyer what is your occupation?

A. I am supposed to be a rancher, fruit grower, packer.

Q. And your present occupation as such? [9]

A. The same.

Q. And that was your occupation during 1944 at the time of the sale of the Dofflemyer ranch?

A. Yes.

Q. How many years have you been engaged in such occupation?

A. Well I have been engaged in the orange business practically all my life, or in this particular place I started in about 1912.

Q. You are talking of the 110 acres you sold in 1944?

A. Yes. I continued until it was sold in 1944.

Q. During 1944 you were operating the ranch under a partnership agreement, I believe?

A. That's right.

Q. What was the name of that partnership?

(Testimony of W. Todd Dofflemyer.)

A. T. J. Dofflemyer and Sons partnership.

Q. And who were the partners?

A. The partners were my brother—and Louis Dofflemyer, and my sister Mrs. Watson.

Q. The petitioner in this case?

A. That's right.

Q. And yourself?

A. And myself, yes.

Q. And what were the activities of the T. J. Dofflemyer and Sons partnership?

A. T. J. Dofflemyer and Sons operated the property, this [10] 110 acres, and 5 acres of peaches and about 80 acres of grapes which was owned as tenants in common by the same party.

Q. The partnership then did not cover the ownership of the property but just operated it; is that right?

A. That's right. They were an operating concern exclusively.

Q. Who kept the books and records of the operations? A. I did.

Q. Do you have them here in court?

A. Yes.

Q. I show you a compilation. Would you identify it and tell the court what it is?

A. This is a compilation prepared from the books and shows the book value of the assets. I see that is the date—I think it's the date of the sale. That doesn't necessarily mean that there aren't some other assets. This is the book value of the assets on the property at that time.

(Testimony of W. Todd Dofflemyer.)

Q. Well, at the bottom it says, "Note: Included in the land are pipelines, stands, valves, together with 28.75 inches ditch water rights of the Foothill Ditch Company." Those assets were not on the books?

A. That's right. Also some three other assets.

Mr. McGregor: I would like to offer this as Petitioner's Exhibit 2.

Mr. Hurley: If the court please, I would like to ask [11] the witness a question. Mr. Dofflemyer, when was this tabulation prepared?

The Witness: Oh, the tabulation? I don't know just when the tabulation was prepared, but that's a record from the books itself.

Mr. Hurley: Did you personally make it?

The Witness: Yes.

Mr. Hurley: Was it prepared recently?

The Witness: No—quite a while ago—probably at the end of the year. In other words, we generally have to make those up every year for filing for income tax purposes. I think that was made at the end of the year. I don't know just when.

Mr. Hurley: Did the note that you have on the bottom of the tabulation appear on the original?

The Witness: No, that was on there originally, this is——

Mr. Hurley: I understand that but I am speaking of the tabulation—in the note which appeared at the bottom of the tabulation—was that placed on there recently—does it appear on the books or just——

(Testimony of W. Todd Dofflemyer.)

The Witness: No, it doesn't appear on the books. I stated that.

The Court: Do you mean was it put on that tabulation recently?

Mr. Hurley: Yes, that is my question. [12]

The Court: In other words, was that note originally on the tabulation, or was it put on that copy there?

The Witness: I imagine it was put on this copy.

Mr. Hurley: Did you put it on there?

The Witness: I testified that it was on there.

Mr. Hurley: Who personally wrote the note that appears on the bottom of the exhibit.

The Witness: I think I dictated it.

Mr. Hurley: And when did you do that?

The Witness: I wouldn't know exactly the time.

Mr. Hurley: In 1944 or '45?

The Witness: Well, I wouldn't say that definitely; no.

Mr. Hurley: No objection, your Honor.

The Court: It may be received and marked as Petitioner's Exhibit 2.

The Clerk: Admitted in evidence.

(The document above-referred to was received in evidence and marked Petitioner's Exhibit 2.)

Q. (By Mr. McGregor): Mr. Dofflemyer, I show you a compilation of figures. Will you identify that and tell the court what it is?

A. Yes, this is a ten-year record of production, income and expenses, with average prices of the orange

(Testimony of W. Todd Dofflemyer.)

grove sold to Mr. Pogue in 1944, and I might state that the word "cultivation" [13] —it might be a little bit misleading. It might be broadened to include cultural costs including all costs. The 4th column, strictly speaking means all cultural costs.

The Court: Maybe you had better amplify that a little.

The Witness: It means cultivation and irrigation and tree care and fumigating and all the other costs that go with that. The word "cultivation" was just used there as a sort of a heading; that is all. However, it means all cultural costs. (14]

* * * * *

Q. (By Mr. McGregor): Mr. Dofflemyer, will you identify this document?

A. This is the escrow agreement, or a copy of the escrow agreement, dated August 10, 1944, wherein the Dofflemyers sell to one J. W. C. Pogue this 110 acres of oranges and 5 acres of peaches together with wind machines and equipment and everything.

Mr. McGregor: This does not seem to be signed by Mr. Pogue, but I think there is no objection to that; is that right?

The Witness: I think the original was signed.

Mr. McGregor: I would like to offer this in evidence if no objections.

Mr. Hurley: No objections.

The Court: It may be marked in evidence as Petitioner's Exhibit 5.

The Clerk: Admitted in evidence.

(Testimony of W. Todd Dofflemyer.)

(The document above-referred to was received in evidence and marked Petitioner's Exhibit 5.)

Q. (By Mr. McGregor): Mr. Dofflemyer, I show you a photostat of some computations of measurements. Will you identify it?

A. Yes. This is a picture of the—or a map of the property that was sold. On this map it shows the pipelines and the diameter of the pipelines and their location, the number of stands and valves, gates, and things of that kind. [19]

* * * * *

Q. Now this Downing ranch is the one, I take it, that is marked in Exhibit 8 and drawn with red pencil and marked "B"—is that right? [39]

A. That's right. That's the Downing Ranch. That was distributed to Mr. Cobb.

Q. And the ranch was sold about the same time when your ranch was, of 110 acres, that went to Mr. Pogue? A. That's right.

Q. In the escrow of August 10, 1944?

A. It was also sold to Mr. Pogue at about the same time.

Q. That is during August of 1944?

A. That's right.

Q. And you know what price the Downing Ranch was sold to Mr. Pogue for?

A. Well, I don't know exactly, but I heard it was $185,000.00.

Q. Now, Mr. Dofflemyer, when the 110 acre orange orchard was sold to Mr. Pogue, will you state when the fruit was set, if you can, on the trees?

(Testimony of W. Todd Dofflemyer.)

A. Well, I think the fruit—we call it set about July 1st—sometime in July, possibly.

The Court: What do you mean by "set"?

The Witness: We mean by that after the June drop is over.

The Court: The June what?

The Witness: The June drop.

The Court: What do you mean by "drop"?

The Witness: In other words, when the oranges blossom in the spring there's lots of blossoms on the trees and lots of little fruit set on the trees, and then during June, sometimes in May, weather conditions cause a big percentage of these to drop off, and we call that the June drop.

The Court: Sounds like growing cotton down in the delta country.

The Witness: I don't know anything about cotton but probably the 'olls would drop the cotton the same way.

The Court: To some extent.

The Witness: But, of course, I have seen the June drop extend after the 1st of July, sometimes in the middle of July.

The Court: Depends upon conditions?

The Witness: That's right.

The Court: That is somewhat comparable to the cotton except that in cotton mostly it drops off when it is in bud—in bloom.

The Witness: Of course, a lot of these do too, when they are in bloom.

Q. (By Mr. McGregor): When the fruit sets, I

(Testimony of W. Todd Dofflemyer.)

take it that is from the period of time that if there is any value it would be from that period, is that right?

A. Well, the value, of course, is there all the time, but you don't know just what it is. It might be nothing—it might be something. Just for purposes of argument you might [41] say the fruit is set on July 1st, but that's about all you can say. Now, what value it would have on July 1st—that's just problematical.

Q. When does the fruit become mature?

A. Fruit becomes mature when it passes the test.

Q. We are talking about the 110 acres that was sold.

A. The fruit—any kind of fruit—would not be matured until it passes the maturity test.

Q. Well, when would that be?

A. That would be anywhere in that particular grove from about the 1st of December to about the 15th of January.

Q. Now you say it would have to pass a certain test. What do you mean by that?

A. The maturity test is what we call it. It is the eight to one test—eight parts of soluble solids to one part of acid and it also has to have a 25% characteristic orange color before they are allowed to be picked.

Q. Who establishes that test?

A. It is established by the state.

Q. Under state laws you cannot sell fruit unless it qualified on that test, is that right?

A. That's right. You might be able to go and pick a few oranges off that particular grove before that

time by climbing to the tops of the trees and getting a few of the oranges that are out there in the sun and which mature a little [42] earlier than the general average.

Q. Now upon this orange grove are all the oranges picked at one picking or are there two or three pickings?

A. Well, until it becomes generally mature we always used to pick them on several pickings over the tops of the trees first, and on the outside where the sun would shine on them. Wherever the sun was they would seem to mature a little earlier, and a little later, when they became mature all through the tree, we would pick the whole tree at once.

Q. In other words, under the leafy part would not mature as fast?

A. Usually, yes.

Q. How many pickings do you have?

A. Generally two pickings—sometimes three.

Q. In your experience, Mr. Dofflemyer, what percent of maturity would you say the oranges were upon the 110 acres that were sold to Mr. Pogue on August 10, when the contract was entered into?

A. Well, just figuring roughly I would say they would be about 15% matured.

Q. How do you figure that?

A. Well, I would figure maturity at a rather accelerated rate. I would figure it at about 10% for July, and then accelerate it at 5% for each month, including November, see, for five months, then I

(Testimony of W. Todd Dofflemyer.)

would say that they would be matured [43] possibly on the first of December.

Q. In other words, you would say they would mature about 10% in July? A. That's right.

Q. To the extent of 25% in August?

A. No, 15% in August.

Q. Well the 15 and 10 that makes 25%. And by the first of September they would be 25% matured. And then October?

A. And in October I would increase it—no, September would be 20%. You see, you increase it each month by 5% because they grow faster and, in other words, they are getting closer to the time of harvest.

Q. And the risk is less, is that it?

A. I wouldn't say the risk is less. The prevailing risks are getting greater all the time. Your fruit can get up to 70% mature and then you can lose it.

The Court: Do I understand what you mean by the percentage of maturity? Is it the rate of development towards maturity from the date you fix as having the fruit set, namely, from the first of July?

The Witness: That's right.

The Court: All right.

Q. (By Mr. McGregor): And you apply this testimony, I take it, to the 110 acres of oranges that were sold to Mr. Pogue? [44] A. That's right.

Q. Now when are the oranges picked, usually?

A. Well they are picked under a maturity test—they have to be ripe. Then they have to have a prorate—they are picked under what we call the Prorate Act and whereby only a certain amount can be

(Testimony of W. Todd Dofflemyer.)

picked in certain given periods and that period extends from the date of maturity, which would be about the 1st of December on this particular grove—for other groves it would be a little bit earlier—until along about the 1st of February. I think that was the case in that particular year, now—I think it's stretched out even to the 1st of March.

Q. And then they are sent to the packing house and packed, is that right? A. That's right.

Q. And how long do they keep them in the packing house?

A. They are kept in the packing house about an average of five days.

Q. And then they are shipped to the market?

A. That's right.

Q. When do you know what you are going to get for the crop?

A. Well, you don't know until after the fruit is sold in the east what you are going to get for the crop. For any particular orange or any box of oranges you don't know at all what you are going to get. It's just sold on a delivered [45] basis, and the price changes every day.

* * * * *

Q. (By Mr. McGregor): Mr. Dofflemyer, in respect to the freeze of the oranges, how often do you have a freeze in Exeter?

A. Well, what we'd call a freeze—I imagine about every ten years we'd have a freeze, and that's a freeze what I mean that you can't do much about it. Our average on that grove shows frost damage on the aver-

(Testimony of W. Todd Dofflemyer.)

age of about every four years from 1913 up to the time when we disposed of it.

Q. Would you like to label the years that you have had frost damage?

A. I think I could, but if we could take an average of every four years——

Q. Well that is the damage that is had beyond the control that you have had with wind machines and smudge pots, is that right?

A. Yes, that's right. In other words, frost damage—we ought to take care of minor damage. In other words, in the spring we might have a frost and we ought to take care of that with the ordinary equipment we have at the present time, but when it comes to a hard freeze it's pretty hard to take care of it with anything. It just gets too cold.

Q. What was the last freeze immediately prior to the date that you sold the 110 acres to Mr. Pogue?

A. I believe it was 1937. [77]

* * * * *

Q. Now, Mr. Dofflemyer, I would like you to explain to the Court how the oranges are marketed. Are most of the oranges in your grove of the 110 acres here, as well as your other oranges in Exeter, marketed through the California Fruit Exchange or its subsidiaries?

A. Most of them are marketed through the Southern California Fruit Growers Exchange or Mutual Orange Distributors.

Q. Will you describe to the Court the process of getting your money out of that organization?

(Testimony of W. Todd Dofflemyer.)

A. Well, ordinarily the fruit is handled through an association which is a member, a marketing group in this particular case, called Central California Citrus Exchange, and this exchange in turn is a member of the group called The California Fruit Exchange, and the California Fruit Exchange sells the fruit. The packing houses—in other words, you first take the orange, pick it off the trees, deliver it to the packing house. The packing house then will sweat the fruit. That means color it. Then they prepare it for market, size it, wrap it, box it, put it in the car, and then it's shipped.

Q. Pre-cool it? [80]

A. Sometimes, if it is necessary. If the weather is warm they will pre-cool it and if it is not warm they will pre-cool it in transit and they will ship it east.

Q. Do you know what you are going to get when you ship it?

A. Oh, No. You ship it east and you turn it over to the California Fruit Exchange, and they will sell it for you.

Q. I take it the California Fruit Exchange is a non-profit exchange?

A. That's right. They sell it for the best price they can obtain in the eastern markets and you don't know what you are going to get for that fruit. You might guess right and then again you might guess wrong. It fact, most of the time we always guess wrong.

The Court: You would not be like the man digging potatoes, and the fellow asked him what he was doing

(Testimony of W. Todd Dofflemyer.)

and he said, "Digging potatoes," and the fellow said, "Did you make a good crop?" And he said, "I don't know. I didn't make as many as I thought I would, but I didn't figure on making anything anyhow." You do not have that attitude, do you?

The Witness: We always hope we'll get a good price, but we never know until the fruit is harvested. Then, after the fruit is sold in the east the money is returned by the Exchange, by the selling agent, to the packing house where it then is pooled with all the other fruit that is sold. So [81] even after you get the sale of your fruit back there, you still don't know what you are going to get for it until the rest of the fruit is sold too.

Q. (By Mr. McGregor): How late is that?

A. That might be pretty late, depending how much you get in the later pools and how the packing house operates their pooling system. Sometimes they operate the pooling system under a season pool and I think that's becoming more prevalent than any other way, and if it is a season pool you wouldn't know what you were going to get exactly until the last case was in, which might be along in March.

The Court: Do you mean by that that certain fruit that goes into the packing house from all of these groves would go in a pool and then it would be moved to market over a period of time and sold over a period of time, and if the price varied on the early, as compared with the middle shipments or the last shipments, why they wait until the whole pool is disposed of and then prorate it—prorate the average price, is that the way it is done?

(Testimony of W. Todd Dofflemyer.)

The Witness: That's right—most of them are.

The Court: In other words, the price that the grower gets is the average price on the pool?

The Witness: That's right.

The Court: Regardless of whether his might have brought a greater or lesser amount? [82]

The Witness: That's right.

Q. (By Mr. McGregor): And how were the oranges on the 110 acres that you sold to Mr. Pogue marketed—under a pool system?

A. Well, Mr. Pogue has his own operating system, but the same principle would apply. He wouldn't know what he was going to get for his average until his last car was sold.

Q. Has he got a pool system that he markets his crop under?

A. I couldn't know. He has his own packing organization, and I didn't think it would be necessary to have a pool, but still the same thing would apply, because his would be the average of all the oranges that went into the packing house. Whether he keeps one grove separate from another grove, I wouldn't know that.

Q. And you say that 75% of the oranges in Tulare County are marketed under the California Fruit Growers Exchange or subsidiaries?

A. That I think is right.

Q. And about 10% through the Mutual Orchards Association, is that right?

A. About 10 to 12, I'm not exactly sure.

(Testimony of W. Todd Dofflemyer.)

Q. And Mr. Pogue markets his oranges the same way?

A. No, Mr. Pogue markets his through the California Fruit Growers Exchange. [83]

Q. He has the same question of establishing what he is going to get for the oranges?

A. Yes, he has.

The Court: Do I understand you, though, that he operated in a way so that he set up his own pool.

The Witness: That's right. He's a packing house entity in himself and he is a member of the California Central Fruit Growers Exchange. I think he handles only his own fruit.

Q. (By Mr. McGregor): Now, Mr. Dofflemyer, when did you put this 110 acres of orange orchard and the five acres of peach orchard up for sale?

A. I believe it was along in May 1944.

Q. And who did you list it with?

A. Mr. Balaam.

Q. And is he a real estate broker in Exeter?

A. Yes.

Q. He is in court here now, is he?

A. Yes, he is. I see him over there.

Q. And when he sold the orange orchard and the peach orchards under the agreement of August 10, 1944 did you reduce the price over that which you listed it in May?

A. We didn't change the price any.

Q. In other words, you sold the orchard for exactly the same price as you offered it in May of 1944, is that right?

(Testimony of W. Todd Dofflemyer.)

A. That's right—in May 1944. We also offered the [84] vineyard, but in August 1944 we withdrew the vineyard from the market.

Q. I see. Now when you discussed the terms of the agreement to sell, did you have any oral or written allocation of any amount of the sale price to any particular asset that was sold? A. No.

Q. You placed——

A. I want to qualify that. We did sell—I think it was some oil and some ladders and, I think, a little truck.

Q. That was the qualification we made this morning, that about $700.00 worth of assets were sold out of escrow. Other than those 2 items, there was no allocation of any particular part of the sales price which you agreed to allocate to any particular asset?

A. That's right.

Q. Would you explain to the Court the reasons for selling the grove?

A. Well, of course I was influenced possibly by the fact that there might be a freeze at that particular time. My son was in Europe with the Army. D-Day had just happened in June 1944. He was somewhere on the continent—I didn't know where. I felt pretty low at the time. And all those factors together—my brother was feeling pretty badly at the time—he was a really sick man and he had been taking care [85] and operating the grove at that particular time and he just said he couldn't do it any longer, and I had my nephew up there and he didn't get along with my brother, and the thing was a continual source of

(Testimony of W. Todd Dofflemyer.)

worry to us. And while the market looked like it was pretty good we felt, well the best thing to do is sell it before we let it deteriorate, and go back. If we can't take care of it, and help was hard to get and we didn't know from one time to another that we were going to get any help at all, and I thought the best thing to do was to sell it now, if we can do so.

Q. Mr. Balaam also sold the Cobb & Dofflemyer Ranch, the Downing Ranch, at that time?

A. That's right.

Q. You have an opinion as to what should be allocated for the unmatured oranges at the date of sale, do you not?

A. Well, you mean as to just what they were worth?

Q. The fair market value, if anything, that the oranges were worth, any time between August 10th and September 1st.

A. Well, that's a hard question to answer, but if you got to have it, I'll try it.

Q. Well, there is potential value there, is there not? A. Yes, I think so.

Q. What would you say was the value of it?

A. I would suggest that possibly the cost of the oranges from the first of the year, from January 1, 1944 to the date [86] of sale, August 10, 1944, might be considered the fair market value of the oranges at that time regardless of the amount of oranges on the trees.

Q. And that cost of cultivation to the time the grove was sold was how much?

(Testimony of W. Todd Dofflemyer.)

A. Around $16,000.00.

Mr. McGregor: If your Honor please, we have already stipulated that in the record this morning and I think that was the question that you had asked about, this morning, as to what the grove had cost to cultivate up to the time of sale.

The Court: No, I did not ask any question about it. I just merely observed that part of what was shown on those figures, I mean on that tabulation, for the other years was likewise proper for 1944. I did not ask any questions.

Q. (By Mr. McGregor): Now the peach orchard of five acres, Mr. Dofflemyer, it was agreed that you would finish picking the crop? I imagine they were ready for picking at the time of sale, is that right?

A. They were mature and ready to pick.

Q. And did you pick them under the agreement and turn over the money to Mr. Pogue?

A. Yes, we did.

Q. And how much did you turn over to Mr. Pogue for the sale of those peaches? [87]

A. As I remember it was about $1,700.00.

Mr. McGregor: It is stipulated in the record, $1,729.74.

A. Do you want to know—you asked me another question here a while back about the valuation of the oranges, and I gave you one way I might value them. Do you want to know another way? Well, we could evaluate in another way by taking the average for ten years and establishing the percentage of maturity at the time of sale—the average price received for ten years.

(Testimony of W. Todd Dofflemyer.)

Q. And the production for ten years?

A. Well, the average price would be reflected in the production. And to take that as a basic figure, then you could take the percentage of maturity, multiply that by the average over the ten years—the average price received—then multiply that by the estimated crop and you should have the fair market value at the time of the sale. That would be another way of figuring it.

Q. And on that basis would you venture an opinion as to what the value of the unmatured oranges were at the date of the sale?

A. I imagine it would be about $125.00 an acre, possibly—$100.00 an acre, possibly.

Q. By the way, how much did it cost to produce the peaches that were sold up to the date of sale? [88]

A. As near as I can remember, about $3,000.00. Possibly it was a little bit more than that.

Q. Does the figure of $3,107.04 appear right?

A. That's—seems to be correct.

Q. Mr. Dofflemyer, you state that you based your opinion upon the evidence that is already in the record of the sales during the past ten years, the production, and the elements of risk, and the other factors that were testified to, is that right?

A. Now what is that question again?

Mr. McGregor: Mr. Reporter, will you read the last question?

(Last question was read by the reporter.)

The Witness: Yes, that's correct.

(Testimony of W. Todd Dofflemyer.)

Q. (By Mr. McGregor): Mr. Dofflemyer, did you ever inventory unmatured oranges on the trees?

A. Did I ever inventory them?

Q. Yes, sir. A. No.

Q. Do you know of anybody that ever did?

A. No.

Q. You would say they are not inventoriable property, is that right?

A. No, I wouldn't consider them so.

Q. And, I take it, that you do hold unmatured oranges [89] for sale to customers in the usual trade of business? A. No.

Q. Could they be sold—unmatured oranges?

A. No, it would be against the law.

The Court: What do you mean it would be against the law?

The Witness: Well, an orange has to be matured before it can be crated and be offered for sale in the market.

The Court: Well, what do you mean by crating them and selling in the market?

The Witness: Well, that's the way we sell them.

The Court: Yes, that is the way you sell ripe oranges, but you could sell a crop on the trees, could you not? That is if you could find a buyer?

The Witness: Yes.

The Court: The law would not prohibit that, would it?

The Witness: No.

Q. (By Mr. McGregor): You do not know of any sales of oranges on trees, do you?

(Testimony of W. Todd Dofflemyer.)

A. Oh, yes. There's been sales made in the past—not too many—very few sales are made on the trees.

Q. Do you know what price is paid for the immature oranges, if there have been sales?

A. That varies a great deal. It could be a small price; [90] it could be a large price, depending on the willingness of the buyer to purchase oranges on the trees. In other words, if he saw a particular crop and he liked that particular quality and he wanted to do something with them, why he might purchase them on the trees. But under the present regulations that is not generally done, because of the fact that he also has to have prorate, and he can only ship a certain portion of those oranges that he might purchase on the trees in a certain given time, and ordinarily when a man purchases oranges on the trees he wants to be assured that he can ship those oranges when he wants to ship them, where he wants to ship them, and get any price that he can for them. In other words, he's practically got them sold to somebody that wants them at a particular time.

Q. Do you know of any sales of immature oranges of comparable groves as of August 10 or September 1st?

A. No, I never heard of any oranges being sold on the trees that early.

Q. Mr. Dofflemyer, do you know what is the usual return expected by an orange grower or orchardist on his investment in the orange industry or citrus industry—how much return on your investment would be expected?

(Testimony of W. Todd Dofflemyer.)

A. Well, of course, they get whatever they can, and I don't think it can be hardly reduced to a return on the investment, but ordinarily, in my experience, I figure that a person should be entitled to about 10% on the investment over [91] a period of years, considering the risks involved—I believe that 10% on a fair market value would be a reasonable allocation. They don't always get that, you understand.

* * * * * [92]

WILEY D. AMBROSE

was sworn and testified as follows:

The Clerk: Will you state your full name and address, please.

The Witness: Wiley D. Ambrose, 156 South "C" Street, Exeter.

Direct Examination

Q. (By Mr. McGregor): How long have you lived in Exeter, Mr. Ambrose? A. Since 1922.

Q. Will you state your education?

A. I am an alumnus of the University of California at Los Angeles. I also spent one year at the University of Southern California.

Q. Did you specialize in any particular studies at those institutions?

A. Yes, I specialized at the University of California in Education—at the University of Southern California in law. [135]

Q. And any other schools?

A. No other schools, except courses that I had taken by correspondence.

Q. Did you take any agricultural studies?

(Testimony of Wiley D. Ambrose.)

A. Oh, yes. I had taken a number of courses through the Extension Division at the University of California.

Q. Particularly with reference to citrus lands?

A. No, I can't say that, but what I have done is this: I've been in the—I've been growing oranges for 27 years, and during all of that period I have read various bulletins and magazines and all the information that I could get. I have always—I have also tended many meetings where the matter of citrus was discussed and have tried to keep up to date on citrus.

Q. You were employed at one time by the Agricultural Department—was that for the state—you were employed at one time by the Department of Agriculture for the Spreckle Sugar Company?

A. That is correct. I was employed by the Spreckle Sugar Company before I came to Exeter.

Q. Was that through the Department of Agriculture for the state or for the Federal Government?

A. I was employed directly by the company itself.

Q. I see. That is in their Department of Agriculture? A. Yes. [136]

Q. Of Spreckle Sugar Company? A. Yes.

Q. You were also employed in the California Fruit Exchange?

A. California Fruit Exchange, which is a deciduous organization with headquarters in Sacramento. I was field man for them for a period of ten years and then for about another eight years I acted as a packing house manager.

(Testimony of Wiley D. Ambrose.)

Q. You have also been employed for the State of California on the State Highway Department, is that right?

A. Yes, I've been, from 1933 until 1943, a period of about ten years. I was employed under the Division of Contracts and Rights of Way as an appraiser and a right-of-way agent.

The Court: Let me ask a question. You say you were employed by this California Fruit Exchange for how long?

The Witness: A period of ten years.

The Court: What did you do?

The Witness: I was a field man for them a part of the time, and the other portion of the time I managed a packing house.

The Court: What do you mean by a "field man"?

The Witness: Well, I went out and interviewed growers and signed up contracts with growers.

The Court: Interviewed them about what? [137]

The Witness: The interviewing was to get them to become members of the California Fruit Exchange, and I also advised them about the growing of fruit and the handling of fruit.

* * * * * [138]

Q. Will you state them to the court?

A. In the first place, you are asking me to place a valuation on some orange trees for just one year.

Q. Yes, unmatured oranges on the tree as of August 10, 1944.

A. I have given you the rule that I would use. I would say that that is about what a buyer going and

(Testimony of Wiley D. Ambrose.)

looking at the grove and seeing the immature fruit there would pay for it, but also a buyer would have this thing in mind particularly: In buying a grove you have in mind what the income will be through a period of ten years or fifteen years or twenty years. Here is a possible income for only one year and it might be possible that this would be the very year that you might have one of those very hard frosts that we have up there, and you not only would be out not only your expense of cultivation, you would be out your expense of protection by heaters and by wind machines and all other expenses in connection with them.

Q. In other words, the risks of the business, is that right?

A. The risks of the business are too vague to place an evaluation for just the one year. It would be just as risky if you went out to Santa Anita and there were ten horses running and you picked out one horse. I don't think it's any more risky than that. [150]

The Court: Would you not change that and say that you picked out one horse and instead of betting him across the board, you bet him on the nose?

The Witness: I'll agree with the court on that.

Q. (By Mr. McGregor): Mr. Ambrose, would you venture an opinion as to what the percent of maturity the oranges were as of August 10 on this 110 acres of orange grove that was sold to Mr. Pogue?

A. As of August 10?

Q. August 10, 1944.

A. I would say somewhere between 10 and 15%—

(Testimony of Wiley D. Ambrose.)

somewhere between 10 and 15%. My dates—the reason for the difference between my dates—the difference between my testimony and Mr. Dofflemyer's testimony is this: Because I say the date of the setting of the crop is as of July 15 rather than as of July 1, because you usually have quite a bit of June drop during July.

Q. You say 15% mature?

A. Yes. 10 to 15%—in there.

Q. Would you accelerate the maturity as the crop got near to being ready for picking?

A. I think I would—yes, sir. Yes, I'd add about 5% to that each year.

Q. Five per cent each month?

A. Each month, I should say. [151]

* * * * *

R. B. WALLACE

called as a witness for and on behalf of the petitioners, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. McGregor:

Q. Mr. Wallace, will you state your occupation?

A. Sales Manager of Orange and Grapefruit Sales for the California Fruit Growers Exchange.

Q. Will you give us your education?

A. Business education?

Q. Yes; scholastic training.

A. I graduated from high school and business college. Then I went to work in 1913 in the citrus business in Riverside, California.

(Testimony of R. B. Wallace)

Q. Since 1913 what have you done?

A. Well—

Q. Along the citrus growing industry.

A. For four or five years I worked in Riverside. My father was a grower and I worked in the office of a packing house; then went into the sales office of what was termed at that time the Riverside-Arlington Heights Fruit Exchange. [220]

Q. What year was that?

A. About 1914.

Q. How long did you work for them?

A. About four years.

Q. What were your duties?

A. Assisting in the sale of fruit produced in that area.

After that I went to Upland, was Assistant Manager of what is called the O.K. Fruit Exchange located in Upland, which handles the sale of fruit to the California Fruit Growers Exchange in the area of Upland, Cucamonga and that area.

Q. Give us the years.

A. Roughly, from about 1919 to 1922.

Q. Continue.

A. From Upland I went to the Orange County Fruit Exchange at Orange.

Q. What were your duties there?

A. Assistant Manager of Orange County Fruit Exchange. Two or three years there and I came into the Los Angeles office of the California Fruit Growers Exchange about 1924, '25.

Q. Have you been with them ever since?

(Testimony of R. B. Wallace)

A. Yes, sir.

Q. What has been your position in the California Fruit Growers Exchange? [221]

A. Well, the last seven or eight years I have been Orange Sales Manager. Prior to that time I was Assistant Orange Sales Manager during my period in the Los Angeles office.

Q. Can you tell the court approximately what per cent of the oranges produced in California are marketed through the California Fruit Growers Exchange, your organization?

A. I would say, roughly, around 73, 75 per cent; something like that.

Q. Do you know how the rest of it is marketed?

A. Well, there are two or three marketing organizations that have sales facilities all over the country, such as the Mutual Orange Distributors and the American Fruit——

Q. How much do they distribute?

A. Mutual Orange Distributors I would say around 12 per cent. Then there is the American Fruit Growers that of the California crop have possibly 5 or 6 per cent; something like that. Then, in addition to that, there are several individual operators who handle their sales through brokerage arrangements or some such sales arrangement as that.

Q. A very small percentage; is that right?

A. Yes.

Q. Would you estimate?

A. Possibly the group of them would be around 10 per cent. [222]

(Testimony of R. B. Wallace)

Q. Does your organization, or do you through your organization, ever buy an orange crop on the trees? A. No, sir.

Q. Do you know whether any of the rest of them do?

A. You mean individuals connected with our organization?

Q. Yes. No, I mean the other distributors or independent marketers.

A. Some of these so-called independents may be so-called cash operators. In other words, they buy crops from producers.

Q. Do you know any of them that do that?

A. I know that they do do it, yes.

Q. Buy the unmatured crop on the tree?

A. No, no.

Q. How do they buy the crop?

A. Well, I know of—even a person in the business of buying crops, to supplement his volume—to my knowledge they do not buy crops until the crops are mature and ready for harvest.

Q. Will you tell the court exactly how the California Fruit Growers Exchange market the crop?

A. Well, we maintain sales offices in the principal cities of the United States and sell to the distributing trade through those sales offices at cost, and it very—well, I might say—I might explain first: I don't know if [223] you are familiar—At the start of the season we estimate our costs and deduct or set what is called a "retainer" to cover our expenses. Then at the end of the year we refund the difference between the cost

(Testimony of R. B. Wallace)

of our expenses and the deduction that was set at the bginning of the season.

Q. On the marketing, then, of a crop, when does the grower know how much he is to get for his crop?

A. After the crop is sold.

Q. When is that?

A. Well, different individual packing houses marketing through the Exchange have different what we call "pooling systems." They may have short pools which might run for a period of two weeks, or they might have what would be termed a "season" pool; or you might have variations in between those two extremes.

Q. All right. Now, explain a short pool. What does that mean?

A. Some shippers have what you might call a "pre-season pool." In other words, as the crop comes in to maturity certain growers' fruit would meet the maturity requirements, where other growers' fruit, or the average of the association, wouldn't meet those requirements; so they have operated on the basis of what is termed a pre-season pool, we will say, and that pool would be for just a short period until the crop was generally mature. [224]

Q. Then, after the pool is completed——

A. Well, after the final car in the pool is shipped, you might say, you would have to allow 10 or 12 days for transit to market. Then you might have to wait a week or 10 days for collection of the money; then have to be transported to California. So, roughly, I would say that after the pool is closed it might be 30

(Testimony of R. B. Wallace)

days before the grower would know what he got for his fruit.

Q. You are acquainted with the orange lands in and around Exeter, California, are you?

A. I have visited there, yes.

Q. Do you market the product of the fruit that is grown on what is known as the Dofflemyer ranch? 110 acres sold by the Dofflemyer family in August or September 1 of 1944 to J. W. C. Pogue? Did you handle any of that crop in 1944?

A. I presume Mr. Pogue is a member of our organization and I presume that fruit we shipped through the Rocky Hill Association. I have no definite knowledge, but I assume that would be correct because he does market his fruit through the Exchange.

Q. The Rocky Hill Corporation is a member of the Exchange, too?

The Court: You will have to speak the answer vocally because we don't get the nod in.

The Witness: Yes. [225]

By Mr. McGregor:

Q. Now, Mr. Wallace, with your experience in the fruit industry can you estimate the selling price of oranges, say, three months prior to their maturity?

A. No, I could not.

Q. Why do you say that?

A. Well, there are several reasons. In the first place, there is a lot can happen to a crop as it comes into maturity, either because of weather conditions beyond control of the grower, such as extreme heat-

(Testimony of R. B. Wallace)

waves as we have had. We are subject to pests that can lower the quality of the fruit. That is, it might appear to be very good quality at one time, and if it was affected by a pest a month or six weeks before marketing, it could very materially lower the quality of the fruit.

Also, weather conditions and the amount of moisture would have a great bearing on the size that the individual oranges might attain, which in turn might have an effect on the value of the oranges. Those are factors that affect this crop.

Then, in addition to that you have, you might say, national factors such as competition from other citrus-producing areas that you have no definite knowledge as to what time their crops will mature, how rapidly they will ship them to market; and while you might have some information as to other competition such as apples or bananas, or those things, [226] in addition to all those factors you still have the reception of the housewife as to what she is going to decide to spend her money for and how much she is going to pay.

In other words, you can have a coal strike or a lot of industrial strife that would materially lower your buying power. Things might look good the first of October, and the first of December they might not look nearly so good.

Q. I ask you about three months prior. Would you say the same conditions exist two months prior, or one month prior to maturity?

A. Well, as you get closer to the actual time when

(Testimony of R. B. Wallace)

the fruit will be ready to harvest, I would say that your hazards are reduced to some extent, but there are still hazards there. For instance, an orange that isn't fully mature can be damaged by what you might term—well, let's put it this way: It can be damaged by temperatures that more mature oranges wouldn't be affected by. In other words, the more mature an orange is, the colder and longer duration of those temperatures it can stand. So, as you approach the marketing period you reduce the hazards, the hazards of grade being lowered by pests of one sort or another.

Q. Would the market be any more stable at that time?

A. Well, you might have a better idea of the market, but not a whole lot on the market. I would say that you would know more about your fruit quality and size, and that sort of [227] thing, but your market you wouldn't know about.

* * * * *

By Mr. McGregor:

Q. Mr. Wallace, will you state to the court if it is possible on or about August 20 or September 1 of any particular year on a naval orange grove to estimate with any degree of accuracy the kind or the grade and the size of oranges that might be produced on those trees?

A. You could guess, but I wouldn't say it would be necessarily with any degree of accuracy because adverse weather conditions would retard growth, or favorable weather conditions would enhance growth as the crop comes into maturity.

(Testimony of R. B. Wallace)

Q. You would say that the orange did have value, though, as of August 10 or 20?

A. Certainly, but what it would be, I don't know.

Q. Would you give an opinion as to what per cent of maturity on August 10 the oranges would reach?

A. Well—

Q. I am talking about 110 acres of the Dofflemyer ranch sold to Mr. Pogue in Exeter, California, on August 10. That is, escrow was entered into August 10 and completed September 1st.

The Court: Navel oranges.

The Witness: Well, on August 10 you would assume that on the average you would be beyond the so-called June drop by [232] about, say, 30 days. The oranges, you understand, wouldn't be mature. I don't know that it is the right phrase to say it is immature, because it isn't mature until it's mature, but it has reached a very small part of its development, let's say—the development it would reach before its maturity. In other words, your growth rate would be more rapid in the later period, and that would give you a better clue as to whether the fruit was going to be a better size.

There are plenty of hazards in the way of leaf hopper and thrips, and that sort of thing, that could injure the quality after that time. In other words, there are still a lot of hazards to be encountered.

Q. Will you express an opinion as to what per cent of maturity the fruit would reach as of August 10 or September 1, then, generally, in Tulare County or in and around Exeter?

(Testimony of R. B. Wallace)

A. I would say somewhere around 15 per cent.

Q. Mr. Wallace, I would like to ask you what, in your opinion, then, would the fair market value be of oranges on a grove on August 10, 1944, where the average production of the 110-acre orange grove shows 55,000 loose boxes of oranges produced over the 10-year period. That is, the average.

The lowest production was in 1935, of 24,461 boxes, as compared to the highest production in 1943 of 79,800 boxes, which was sold for an average price over the 10-year period of .7153. Seventy-one and a half cents-plus per box. [233]

Would you express your opinion now upon that value of the growing crop as of August 10 or September 1, 1944?

A. Well, it would just have to be—I don't know of any crops purchased or sold on that date in commercial practice. It would have to be purely an arbitrary estimate as to—it would be very much of an estimate. I would say that you might allocate 15 per cent or so, and figure you would be safe.

Q. You mean 15 per cent of seventy-one and a half cents per average per box?

A. Business just isn't done that way. I don't know of crops being sold or bought until crops come into maturity.

* * * * * [234]

J. W. C. POGUE

called as a witness for and on behalf of the respondent, having been first duly sworn, was examined and testified as follows:

(Testimony of J. W. C. Pogue.)

The Clerk: State your name and address, please.

The Witness: J. W. C. Pogue, Exeter, California.

Direct Examination

Q. (By Mr. Hurley): Where do you live, Mr. Pogue?

A. About a mile east of Exeter.

Q. How long have you lived in the vicinity of Exeter?

A. Well, practically all of my life with the exception of six years.

Q. Where were you born?

A. In Tulare County, and Visalia; then I lived at Lemon Cove.

Q. How far is Visalia from Exeter?

A. About eight miles.

Q. How much from Lemon Cove to Exeter?

A. About twelve miles.

Q. You have lived in the vicinity of Exeter all your life; is that correct?

A. That is correct. [262]

* * * * *

Q. And the consignment organization would never take, or you could never estimate until the fruit is ready and ripe, ready for picking; is that right?

A. No. They could estimate; due estimate. It is common practice with all packing houses to estimate their crops in advance of the shipping season to order their shook, order their paper, and that sort of thing.

Q. Now, Mr. Pogue, you have not answered my question yet as to what in your opinion the maturity of the fruit was on August 10 or September 1, 1944.

A. All I can tell you is the cost of producing that

(Testimony of J. W. C. Pogue.)

fruit was practically over, and the quality could be estimated reasonably accurate.

Q. Will you answer my question? What, in your opinion, was the percentage of maturity as of August 10?

A. Well, I don't know what you mean by "percentage of maturity." That crop had been in the process of being produced for over eight months.

Q. You said it was in the process of being produced over eight months?

A. That is right.

Q. What months are those?

A. Starting when you get the crop off, we will say, in [347] December or January; and by the first of September you have had eight months toward the development and production of another crop.

Q. Isn't it the usual course to say that you don't have a crop until the crop is set after the June drop?

A. Well, I don't know what you mean by saying, "the usual course." You cannot determine with any accuracy what your crop will be until after the June drop.

Q. All right. After the June drop—when does the June drop take place?

A. Largely in the month of June.

Q. When do the oranges set?

A. The first part of July.

Q. Up to August 10, then, what percentage of maturity would you say from July 1 to August 10 the fruit had maturity?

A. Well, I would figure it from the first of the

(Testimony of J. W. C. Pogue.)

year, Mr. McGregor, that your crop is at least, Oh, 65 to 70 per cent produced.

Q. Why would you say from the first of the year?

A. That is when your expenses start to produce that crop.

Q. Haven't you taken care of them ten or twenty years prior? You don't know whether the cultivation for the crop ten years prior to that might be going into this crop, do you? [348]

A. Well, we try to reduce things to a crop-year basis and work on a crop-year basis; and that is what I thought you wanted.

Q. No, I want to know what percentage of maturity these oranges were as of August 10, considering the fruit is mature, say, in December when it is ready for picking. Is that when you say it would be mature?

A. No. I said that fruit is picked sometimes in the latter part of October and first part of November.

Q. I will ask you the average of all the fruit that is picked—when do they mature?

A. The average maturity date would be sometime in the early part of November, and then if you had the prorate, and if things were right, you could pick the whole crop.

Q. Then they continue to mature after November and up to December, and possibly over into January until they are actually picked?

A. They are actually picked sometime in November.

Q. Six per cent are picked in November?

(Testimony of J. W. C. Pogue.)

A. In that particular year. Some years it would be——

Q. We are talking about 1944. We want to know the value of that maturity—the percentage of maturity the oranges were on the Dofflemyer Grove on August 10.

A. Oranges are mature when they test 8 to 1, and those oranges probably tested 8 to 1 in that year in about the [349] middle of November, probably uniformly. The year before, 1943—if my memory is correct—they started to pick on that grove, according to Mr. Dofflemyer's record, on November 3. When an orange tests 8 to 1, it is considered mature by the standardization laws of the State of California.

Q. You only picked 6 per cent in November in 1944?

A. That figure is with reference to all of our shipments to the Rocky Hill Association, Citrus Association. That is not necessarily the figure that would apply to the Dofflemyer Grove.

Q. Did you pick more on the Dofflemyer Grove, than you did on any of the other properties?

A. No, I wouldn't say that. It is probably about the same.

Q. About the same?

A. Yes, probably; maybe a little bit less until the latter part of November, and I am not sure as to when we—what dates we delivered the fruit on Mr. Merchant's house, the M.O.D., but probably in the latter or middle part of November.

Q. You mean 6 per cent?

(Testimony of J. W. C. Pogue.)

A. No, that wouldn't be the 6 per cent. That would be in addition to the 6 per cent, because the fruit that went to Mr. Merchant's house was not in the figures that you have here at all. That was merely the Rocky Hill Citrus [350] Association. [351]

* * * * *

Q. Well, you took a chance in 1949 when you sold the Dofflemyer Ranch, didn't you?

A. 1949? That is this year.

Q. When you sold it.

A. The crop you are referring to is the 1948 crop?

Q. That is right.

A. There was some considerable damage because we were late in picking and it was a very unusual year, as anybody in the country will know.

Q. How much of the crop did you lose?

A. Oh, about 25 acres, I expect, that we didn't pick. However, a part of that was our own fault because we could have picked more if we had worked it right.

The Court: At this point, how much more do we have here?

Mr. McGregor: Well, I don't know. I think that—there are one or two more questions that I would like to ask, and then I will be through, your Honor.

The Court: How much do you have?

Mr. Hurley: I have just two or three questions.

By Mr. McGregor:

Q. Mr. Pogue, could you tell in August or Sep-

(Testimony of J. W. C. Pouge)

tember 1, 1944, what kind of fruit, as to quality as well as the size, that you were going to get?

A. You couldn't tell too accurately, no, but you do, knowing a grove over a period of years—you do have an idea [353] that is fairly good as to whether the size will run large or whether it will run small on that particular place.

Under normal care, normal conditions, a grove that has large-sized fruit generally will have large-sized fruit each year; one that has small-sized fruit will have small-sized fruit generally each year. That is, smaller than the average.

As far as quality is concerned, there is really not a whole lot that can happen to the quality of an orange after the first of September.

As far as these scales and that sort of thing attacking the orange, that is not a problem commercially at all if the place is commercially clean. [354]

* * * * *

W. TODD DOFFLEMYER

recalled as a witness for and on behalf of the petitioners, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. McGregor:

* * * * *

Q. Was the fruit comparable, or what would you say about that?

A. I believe that the fruit on the Downing grove was a little better quality.

(Testimony of W. Todd Dofflemyer.)

Q. Did you get a better price on it or how much better?

A. We didn't always get any better price, but we did get a better grade, which would make it a better price in the long run.

Q. But in the final analysis, per acre, you would receive about seventy-five per cent more on the Dofflemyer Navel oranges as you would from the Downing ranch Navels, that is per acre?

A. That has been the past experience, that is right.

In other words, I get about twenty-five per cent more in money per acre than I would off the Downing Ranch.

Q. Mr. Dofflemyer, do you know of any sales of unmatured fruit on the trees in Exeter district or as a matter of fact, any district in California?

A. I don't know of any sales of unmatured fruit on the trees, though I have heard of sales of matured fruit being made on trees, and sometimes being made wherein the purchaser would agree to take some of the fruit off of the trees when they became matured, but the purchaser didn't always assume the risk there. In other words, lots of times [370] the growers assumed the risk.

Q. Do you have any information or knowledge of what happened to those buyers that have bought fruit, even matured fruit, on the trees, on a cash basis before they were picked?

Mr. Hurley: I object to that. I think the question

(Testimony of W. Todd Defflemyer.)

is improper and calls for a conclusion and pure hearsay.

Mr. McGregor: I asked him if he knew, Counsel. He can say yes or no.

The Court: I don't know if I understand the question, read the question.

(Question read.)

The Court: What do you mean, what happened?

Mr. Hurley: What buyers?

Mr. McGregor: Those that bought fruit on the trees at any time, even when they were mature, on a cash basis before they were sold.

The Court: Let's be a little more definite. I assume you mean what happened to them with respect to some purchases; whether they made money or lost money?

Mr. McGregor: That is right. Did they make money, or lose money, or go broke?

Mr. Hurley: Ask the witness if he knows?

The Court: I don't know. I don't want any generalized statements. If he can specify some instances, and give some showing that he does have proper knowledge of it. [371]

By Mr. McGregor:

Q. Do you have any instances in which buyers did buy mature fruit upon the trees?

A. I know of one man who bought fruit and he paid $1.00 a box for it delivered to the packing house. He bought eight thousand boxes and he told me that he got $8.00 in return for it.

(Testimony of W. Todd Dofflemyer.)

Q. I see. Well, do you know of any other buyers along that line?

A. Well, I know of lots of other general instances, but to be very specific, I wouldn't be able to tell you, Mr. McGregor; as a general rule if they follow the practice, sooner or later they get into trouble. I don't know of any cash operator who has been able to continue cash buying and still be solvent.

Q. You would say then it was absolutely a long chance, is that right?

A. Sometimes they win and sometimes they lose. But in the end they lose. In other words, you just can't tell.

Q. Mr. Dofflemyer, when the Dofflemyer Ranch, orange orchard was sold, were the pipe lines in bad, good, or excellent repair?

A. The pipe lines were in good repair.

Q. And how long would you think, in your opinion, they would last; the life of the grove or some other period of time, [372] or what?

A. Well, it has a very definite life. They have a long life. I will put it that way. Probably from fifteen to twenty years. [373]

* * * * *

Q. All right. Mr. Dofflemyer, you identified and there [374] were introduced into evidence several exhibits having to do with sales by you of certain parcels of land to the Irrigation District, is that right?

A. No, to the Bryant Kern Canal of the Central Valley Water Project. They call themselves so many names.

(Testimony of W. Todd Dofflemyer.)

Q. How much property was sold to them in 1948; in the 1948 sale? A. 1947.

Q. Excuse me.

A. Three and two-tenths acres.

Q. And how about the 1949 sale?

A. That was a small piece; one-tenth of an acre.

Q. And did you, in both instances, secure any severance damages from the state or the canal authority for taking that property?

A. The severance damage is included in that.

Q. In the damage award, is that right?

A. That is right.

Q. You said a moment ago that it was your opinion that sooner or later cash buyers of fruit get into trouble. Sometimes they win, sometimes they lose, but in the end they lose. A. That is right.

Q. That is an opinion of yours?

A. No, that is a fact.

Q. A fact? [375]

A. Yes, sir.

Q. Do you know the financial statements and conditions of all the cash buyers in Tulare County, or ones that have bought for cash?

A. I have heard a good many of them, and they come into the picture and go out of the picture broke.

Q. The practice of cash buying has more or less come into disuse in recent years, is that correct?

A. That is right.

Q. Does the pro rate system have anything to do with the fact that cash buying today isn't as prevalent as it used to be?

(Testimony of W. Todd Dofflemyer.)

A. I believe it has some effect.

Q. Will you explain briefly just what effect it has?

A. Well, in the past, the cash buyer might buy for some particular house in say, Chicago, for delivery on a certain particular date of a certain amount of fruit, when it reaches maturity, and they would be willing to pay a certain price.

For instance, they wanted it for the Christmas trade or holidays. That would be very difficult to do at the present time because of the allocation of the fruit.

In other words, the fruit is under a pro rate and they could only ship a certain amount of that particular fruit at that particular time, and that would discourage any cash [376] buyer from going out and buying that. But that didn't take away the hazard of the market and things of that kind, because lots of times the cash buyer loses on the market.

In other words, he might start out from here with his dollar or dollar and a quarter fruit and get back there and find it is fifty cents.

Q. In other words, the cash buyer is very much in the same position as any trader on the grain market, that buys grain futures?

A. That is right.

Q. Sometimes he wins, and sometimes he loses?

A. Yes, but in this particular case, sooner or later they lose.

Q. That is your opinion?

A. That is the truth.

(Testimony of W. Todd Dofflemyer.)

Q. Mr. Dofflemyer, as to these pipe lines and irrigation ditches, pumping stations, and the like on the property, what was your estimated useful life of those assets for depreciation purposes?

A. For depreciation purposes, I think we set them up as 17 years; some of them may be 10 years.

Q. At the date of sale in 1944 of the Dofflemyer ranch to Mr. Pogue, all of those assets were actually depreciated on the books?

A. No, there were still some on there. I think we have [377] them on there. [378]

* * * * *

LOUIS L. DOFFLEMYER,

called as a witness for and on behalf of the Petitioner, having been previously duly sworn, was examined and testified as follows:

The Clerk: State your name and address for the record.

The Witness: My name is Louis L. Dofflemyer, Exeter, Tulare County, California.

Direct Examination

By Mr. Higson:

Q. What is your occupation, Mr. Dofflemyer?

A. My occupation is rancher, supervision of groves of [394] the Dofflemyer partnership, and also of my own personal groves.

Q. Then how long have you been in the business of orange grower?

A. I have been in the orange growing business since 1913.

Q. Have you continuously been in that business?

(Testimony of Louis L. Dofflemyer.)

A. Except 1945, 1946, and part of '47, when I was sick in the hospital.

Q. And do you own any orange groves up and around the vicinity of Exeter?

A. I do. I own twenty acres of Navels about a mile north of Exeter and about three miles northeast of Exeter I own another ten acres of apples, and about a half mile east of that I own thirty-two acres of Navels and also vineyards.

Q. And have you purchased and sold orange groves since 1913?

A. I have purchased orange groves since 1913. My personal purchase—but I haven't sold my own or any since 1913.

Q. Did you have an interest in the 110 acres of oranges and 5 acres of peaches which have been described as the Dofflemyer ranch?

A. I was one-third partner described as the Dofflemyer orange orchard. [395]

* * * * *

Q. Did you ever hear of immature oranges on the tree being sold on either August 10th, or September 1st? A. I never have.

Q. In your experience, what would be the reason that oranges would be sold that early?

A. If a man sold oranges that early it must have been something wrong with his mind, and I would never dream myself of selling oranges at that date, and turn the orchard over to the buyer to take care of them up to the harvest time.

Q. In other words, the buyer would have to go

(Testimony of Louis L. Dofflemyer.)

into the grove and manage the grove until the oranges were harvested?

A. Yes, because he would be after the crop, and he wouldn't care anything about my orchard. It is the culture in the orchard in the fall that produces the next year's crop, if you don't have any real frost.

Q. In other words, a grower would not turn his grove over to a purchaser so that he might grow the crops and then harvest them, is that right?

A. Not if he was in his right mind.

Q. Would you say there is a possibility that the buyer would damage the grove, is that right?

A. The buyer primarily would grow that crop only. In September, for instance, you take and put on manure and put [403] on straw or hay, and in October and November you do the same thing. You may put on your fertilizers and that is no advantage to this year's crop, but it is an advantage to next year's crop.

Q. Now, Mr. Dofflemyer, you have allocated here $121,000.00 to the orange trees, and you state that included in that figure is $10,500.00 representing 70,000 boxes of oranges at fifteen cents.

Is it your opinion that on August 10th or September 1st that a willing buyer, that is one who is not compelled to buy, and a willing seller, one who is under no compulsion to sell, that in allocating the values on a grove that they would allocate the fair value of the oranges, the sum of $10,500.00?

A. If I was allocating for just the crop there would be no allocation, but when I was selling a

(Testimony of Louis L. Dofflemyer.)

grove and the crop and these small oranges were on the trees and there was allocation, that is the way I would allocate it. But as far as going and buying oranges, I wouldn't do it.

Q. Then you would allocate $10,500.00?

A. Yes, if I sold the trees. [404]

* * * * *

Recross Examination

By Mr. Hurley:

Q. I show you what appears to be a half an orange which was the subject of testimony of your brother, Mr. W. T. Dofflemyer, several days ago, which he stated was a frozen orange.

Is that a navel orange?

A. That is a Valencia.

Q. Is not the type of orange that is on the Dofflemyer property?

A. No, but the inside, the frozen part, the navel and the Valencia have the same on the inside, but the effect would be the same from frost. [421]

* * * * *

JACK M. DUNGAN [478]

called as a witness for and on behalf of the respondent, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you have a seat, please, and state your name and address for the record?

A. Jack M. Dungan, Exeter, California.

Direct Examination

Q. (By Mr. Hurley): Mr. Dungan, how long have you lived in Exeter, California?

(Testimony of Jack M. Dungan.)

A. I was born there in 1903.

Q. And are you appearing in court today in response to a subpoena of this court? A. Yes.

Q. What is your occupation?

A. I am a rancher, orange and grape grower.

Q. How long have you been a grower *or* oranges?

A. In my own rights, owning property since 1929, and I helped to take care of family property since approximately 1920 on.

Q. Do you own any navel orange property?

A. I do.

Q. How long have you owned that, Mr. Dungan?

A. Oh, twenty years. [479]

* * * * *

Q. That was the condition that I stipulated in my question.

When do navel oranges normally set in Exeter district?

A. Well, I have always considered the new crop started as the bloom appears. That is, everybody has his own idea. That is a question that has never come up.

Q. The crop begins, as I understand it, and as the testimony has been, with the blossoms and then in June, or thereabouts, sometime prior to the first of July, you have what is referred to as a "June drop", is that correct? A. That is correct.

Q. And at that time the crop is said to "set", is that correct? A. That is right.

Q. So that the fruit that is adhering to the trees

(Testimony of Jack M. Dungan.)

at that time is likely to be the matured fruit, naturally, is that correct?

A. Well, there have been exceptions to that. Your June drop, I believe I can say in exceptional years has continued into August, but that is an exception.

Q. Would you say that under the prorate procedures that picking time is not always maturity date? I mean by that, are oranges always picked as soon as they become matured? A. No. [484]

A. Well, there has been exceptions to that. Your June drop, I believe I can say in exceptional years, has continued into August, but that is an exception.

Q. Would you say that under the prorate procedures that picking time is not always maturity date? I mean by that, are the oranges always picked as soon as they become mature? A. No.

Q. Why are they allowed to remain on the trees?

A. Well, you just don't pick them, that's that. This fruit matures. You pick it as you come to it. Now as in the case of the prorate, you pick your allotment for that week and the rest is left on the tree. That fruit left on the tree is as mature as the fruit you are picking, generally speaking.

Q. What would you say is the average time that Navels in the Exeter district become mature?

A. The average time, November 15.

Q. About November 15 the Navel crop is mature, most of it?

A. There is enough matured there that you can start picking. [485]

* * * * *

[Endorsed]: Filed February 16, 1950.

[Endorsed]: No. 12982. United States Court of Appeals for the Ninth Circuit. Ernest A. Watson and M. Gladys Watson, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed: June 18, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Docket No. 12982

ERNEST A. WATSON and M. GLADYS WATSON,

Petitioners on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

STIPULATION AND ORDER RE EXHIBITS

It is hereby agreed and stipulated by counsel in the above-entitled case that the original exhibits may be excluded from the printed record but may be referred to by the parties in brief and argument as if part of that record.

/s/ THERON LAMAR CAUDLE,
Assistant Attorney General,
Counsel for Respondent.

/s/ ARTHUR McGREGOR,
Counsel for Petitioners.

So ordered:

/s/ CLIFTON MATHEWS,
Judge
/s/ WILLIAM HEALY,
/s/ WM. E. ORR,
United States Circuit Judges.

[Endorsed]: Filed July 5, 1951. Paul P. O'Brien, Clerk.

IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Monday, February 25, 1952

Before: Denman, Chief Judge; Stephens and Bone, Circuit Judges

ORDER OF SUBMISSION

Ordered petition to review herein presented by Mr. Arthur McGregor, counsel for petitioners, and by Mr. Irving Axelrod, Special Assistant to the Attorney General, counsel for respondent, and submitted to the court for consideration and decision.

IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Thursday, May 29, 1952

Before: Denman, Chief Judge; Stephens and Bone, Circuit Judges

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT

Ordered that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 12,982

ERNEST A. WATSON and M. GLADYS WATSON, Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Petition to Review a Decision of The Tax Court of the United States

Before: Denman, Chief Judge, and Stephens and Bone, Circuit Judges

DENMAN, Chief Judge:

OPINION—May 29, 1952

This case is here on a petition to review a decision of the Tax Court, 15 T.C. 800, that the Commissioner of Internal Revenue was correct in assessing a deficiency against the taxpayer, Watson, in respect of personal income taxes for the year 1944. The issue for our determination is to what extent the profit from a sale of an orange grove, consisting of land, trees and an unmatured crop of oranges, should be apportioned between ordinary income and capital gain. The Commissioner concedes that the profit attributable to the land and trees is capital gain, but contends that the profit attributable to the unmatured crop of oranges should be allocated to ordinary income. The taxpayer contends that she is entitled to the favorable capital gains treatment for her profit from the unmatured oranges under 26 U.S.C. § 117(j).

In 1944, the taxpayer owned a one-third interest in an orange grove near Exeter, Tulare County. The property had been operated from January 1, 1942, under a partnership agreement with her two brothers who also owned one-third interests. About May or June of 1944, these owners listed their orange grove for sale with a local real estate agent; and the price eventually sought for this piece of property was $197,100. The buyer was first contacted in June, but he deferred a decision until the extent of the

orange crop would be better known. On August 10, 1944, the contract for sale was entered into and the growing crop of immature oranges passed to the buyer along with the land. This crop consisted of navel oranges which bloom in the spring. During May and June, a considerable portion of the small fruit drops from the trees; and the oranges which remain on the trees do not mature until early November in the Exeter area. During the negotiations, the manager of the grove estimated the yield for that year would be 70,000 loose boxed. The Tax Court found that this constituted $40,000. of the $197,100. paid for the orange grove.

The pertinent portions of § 117(j).(1) are:

> "For the purposes of this subsection, the term 'property used in the trade or business' means * * * real property used in the trade or business, held for more than 6 months, which is not * * * property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business."

The taxpayer contends that the unmatured crop of oranges on the trees is not personal property but is a part of the realty. Assuming this to be correct, the burden of proof is on the taxpayer to show that such oranges were real property which was "held for more than 6 months" and which was not held "primarily for sale to customers in the ordinary course of her trade or business."

It is obvious that even though the oranges are real property vertically held above the ground, they nonetheless may be realty of a different character from the trees which sustain them and the ground which in turn sustains the trees. The analogy is a steel structure consisting of a large department store which a seller of real estate holds not for sale but for its rental as a permanent capital investment, but which also sustains ten stories of apartments, which are real property, and which the dealer holds primarily for sale of the fee interest in the individual apartments "to customers in the ordinary course of his trade or business" as a real estate dealer. A further analogy is that of a real estate dealer, owner of a thousand acres of land which he rents for pasture as a capital investment, but in which he later sets apart a hundred acres for sub-

division into lots which he holds for sale to customers in the ordinary course of his business. Cf. Rollingwood v. C.I.R., 190 F. 2d 263 (Cir. 9).

It is equally obvious that the only purpose of the taxpayer for the years prior to May, 1944, in holding the portion of property which consisted of the crop was to sell the crop to her customers annually in a business of orange selling. We hence agree with the Tax Court's conclusion and holding that the oranges sold by petitioner and her brothers did not constitute real estate used by them in their trade or business which was "not * * * (B) property held by [them] primarily for sale to customers in the ordinary course of [their] trade or business," and accordingly, the provisions of section 117(j) do not apply.

The situation is equally clear if the orange crop on the trees be regarded as personalty. The only purpose for which it is held is for sale to customers in the business of orange selling.

Since the purpose of capital gains relief is to avoid ordinary income taxation on the realization of values that have accumulated over a long period of time, we are re-enforced in our conclusion that the growing crop here is not entitled to the relief of § 117(j). The value of the crop is largely the product of effort within the tax year and the periodic realization of income from the crop covers a short period approximating the tax year. Rollingwood Corp. v. C.I.R., supra.

It is contended that in May, 1944, the taxpayer ceased to hold the oranges for such sale to customers when she decided with the co-owners of the orchard to hold it with its crop for a unit sale—a holding of the orchard and crop for a sale not in the ordinary course of any business of the taxpayer. Assuming this decision to sell the property as a unit changed the character of the holding of the crop, § 117(j) (1) is not satisfied, for the crop was not held in the non-business sale character for the six months required by that section.

The Tenth Circuit in McCoy v. Commissioner, 192 F. 2d 486 at 488, dealt with land sold with its immature crop of grain as a whole. It held that the profit of the sale of both crop and land constituted a capital gain. That court does not consider the contention that the annual grain crop

though realty is a different kind of realty from the land on which it is grown. It cites but a portion of § 117(j) (1) "real property used in the trade or business held for more than six months" omitting the words, "which is not held * * * by the taxpayer primarily for sale to customers in the ordinary course of his trade or business." There, as here with the orange crop, it is clear that the annual grain crop is "held" while growing for no other purpose than for sale to customers in the ordinary course of business.

Nor do we agree with the Tenth Circuit that its opinion is re-enforced by § 323 of the Revenue Act of 1951 which amends § 117(j) to allow capital gains treatment for unmatured crops sold along with the land and trees to the same buyer. The legislation states that it applies to tax years after December 31, 1950, and the Senate Report accompanying the bill states that when the amendment is effective there will be an annual loss in taxes collected of $3,000,000. Here is a clear recognition that § 117(j) (1) prior to amendment is as interpreted by the Tax Court and this opinion.

In the Fifth Circuit, Owen v. Commissioner, 192 F. 2d 1006, dealt with a Florida orange grove and treated the orange crop as appurtenant to the realty *when sold*. It reasoned that although the crop may have been held for sale in the course of trade or business up to a week before the day of the sale of the land with the crop on the trees, it is the character of the owner's holding on the day of sale which is determinative. Its language at page 1008 is:

> "The fact that the fruit was potentially property held for sale in the ordinary course of business, and for that purpose could have been severed and separately sold by the taxpayer, does not justify imposing a tax upon it in that status, when in fact no such transaction occurred. Taxation must follow the facts."

And at page 1009:

> " * * * it was not, *at the time of these sales*, (our emphasis) property held *primarily* for sale in the *ordinary* course of her business. We repeat, there was no

sale of the fruit as personalty severed from the freehold.''

Obviously, the last-quoted language ignores the requirement of § 117(j) (1) that the taxpayer must show that the crop was not held for a business sale but for a sale as a unit with the land ''for more than six months.''

The decision of the Tax Court is affirmed.

[Endorsed]: Opinion. Filed May 29, 1952. Paul P. O'Brien, Clerk.

IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 12982

ERNEST A. WATSON and M. GLADYS WATSON, Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

JUDGMENT—Filed and entered May 29, 1952

Upon Petition to Review a Decision of The Tax Court of the United States.

This Cause came on to be heard on the Transcript of the Record from The Tax Court of the United States, and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the Decision of the said Tax Court of the United States in this Cause be, and hereby is affirmed.

Clerk's Certificate to the foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 290

ERNEST A. WATSON and M. GLADYS WATSON, Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE

ORDER ALLOWING CERTIORARI—Filed December 8, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.